Supreme Court, U.S.
FILED

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No. ____ OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

FLORIDA MUNICIPAL POWER AGENCY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents the following question concerning review of administrative agency decisions:

When an agency erroneously states that a party failed to present argument on the key issue that was before it for decision, may a reviewing court affirm the agency's decision based on the court's assessment that although the court "has no idea" of the meaning of the agency's statement, the agency did in fact consider and reject the party's arguments, contrary to the agency's clear assertion that it did not?

PARTIES TO THE PROCEEDING

Florida Municipal Power Agency

Federal Energy Regulatory Commission

Florida Power & Light Company

The Florida Municipal Power Agency is a non-profit, public agency, established by Florida law and is owned by its 29 member cities. As such, it is not covered by Court Rule 29.6 as referenced in Court Rule 14.1(b).

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OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit is reported at *Florida Mun. Power Agency v. FERC,* 315 F.3d 362 (D.C. Cir. 2003), and is reprinted at Petitioner's Appendix (Pet. App.) A-1 to A-13. Rehearing *en banc* was denied on March 28, 2003 in an unpublished order, reprinted at Pet. App. C-1 to C-2. Federal Energy Regulatory Commission (FERC) *Final Order Under Sections 211 and 212 of the Federal Power Act Directing Network Transmission Service and Establishing Rates, Terms and Conditions* is reported at *Florida Mun. Power Agency v. Florida Power & Light Co.*, 67 F.E.R.C. ¶ 61,167 (1994), and is reprinted at Pet. App. B-71 to B-112. The FERC's first rehearing decision, *Order Granting Clarification in Part, Denying Rehearing, and Accepting Compliance Filing as Modified*, is reported at *Florida Mun. Power Agency v. Florida Power & Light Co.*, 74 F.E.R.C. ¶ 61,006 (1996), and is reprinted at Pet. App. B-9 to B-70. Its second rehearing decision, *Order Dismissing and Denying Petitions for Rehearing,* is reported at *Florida Mun. Power Agency v. Florida Power & Light Co.*, 96 F.E.R.C. ¶ 61,130 (2001), and is reprinted at Pet. App. B-1 to B-8.

BASIS FOR JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) and Court Rule 13. An order denying FMPA's Petition for Rehearing *en banc* was issued on March 28, 2003, Pet. App. C-1, and the court's mandate was issued on April 15, 2003.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

U.S. Const. amend. V, is reprinted at Pet. App. E-22.

Federal Power Act, Section 206, 16 U.S.C. § 824e, is reprinted at Pet. App. E-1 to E-4.

Federal Power Act, Sections 211-12, 16 U.S.C. §§ 824j-k, are reprinted at Pet. App. E-4 to E-16.

Federal Power Act, Section 313, 16 U.S.C. § 825l, is reprinted at Pet. App. E-16 to E-18.

Administrative Procedure Act, 5 U.S.C. § 706, is reprinted at Pet. App. E-20 to E-21.

STATEMENT OF THE CASE

The Federal Energy Regulatory Commission ("FERC") denied relief to Petitioner Florida Municipal Power Agency ("FMPA"), claiming that FMPA had not presented any argument addressed to the central issue for decision. Pet. App. B-1. The FERC's statement was admittedly erroneous. On review, the Court of Appeals for the District of Columbia recognized that the FERC's statement as to the absence of argument was incomprehensible:

> So what did FERC mean when it said that FMPA neither argued nor presented sufficient evidence of integration? *We have no idea.*

Pet. App. A-9 (emphasis supplied). Nonetheless, the court of appeals affirmed, because based upon *its* review of the record, *it* determined that the FERC had considered and rejected FMPA's arguments, even though the agency itself had stated that FMPA had presented no such argument. *Id.*

The proceeding began in 1993, when the FERC ordered Florida Power & Light Company ("FPL"), a dominant transmission owner, to sell FMPA network transmission services. Pet. App. B-156 to B-157. FMPA both purchases transmission services from and competes with FPL for electricity sales. Pet. App. B-115 to B-130. FMPA contended that it or its member cities own transmission that is useful to the FPL transmission grid, and claimed an entitlement under the Federal Power Act to rate credits or

other rate recognition for this transmission. Pet. App. H-1 to H-30.

In 1994, the FERC held that FMPA would be entitled to rate credits for FMPA "transmission facilities that will operate as part of the integrated transmission system," Pet. App. B-99, but in 1996 the FERC denied FMPA credits. Pet. App. B-25. FERC held that FMPA's transmission was not "integrated" with FPL's transmission grid. *Id.*

FMPA applied for rehearing, arguing and citing evidence that its transmission meets the FERC's standards for "integration." Pet. App. H-1 to H-30. Rehearing applications are part of the FERC's decisional process and are required by statute before a party can seek judicial review. FPA, § 313, 16 U.S.C. 825l(a); Pet. App. E-16 to E-17.

In its 2001 rehearing order, the FERC denied FMPA relief, stating:

> FMPA has not demonstrated, *nor does FMPA even argue*, that its facilities meet the [integration] test [for determining whether customer facilities are entitled to credits].

Pet. App. B-6 (emphasis supplied).

This statement, admittedly in error, can only be attributed to sloppy staff work. As all parties conceded, FMPA presented a myriad of evidence and arguments on rehearing addressed to integration and the FERC's integration test.[1] During the court of appeals' review of the FERC's order,

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[1] *See generally* Pet. App. H-1 to H-30; J-1 to J-28; I-1 to I-25. Appendix A to FMPA's Initial Brief to the court of appeals is an index of FMPA's exhibits and direct testimony showing the "integration" of FMPA's and FPL's transmission. Pet. App. G-1 to G-10.

neither the FERC nor FPL attempted to defend the accuracy of the FERC's statement that FMPA did not argue on rehearing the integration of its transmission. *See* Pet. App. K-2; K-4.

The FERC's finding that FMPA had not presented argument on integration was incontestably significant to its decision to deny FMPA credits. In discussing the FERC's order, Commissioner (and soon to become Chairman) Wood said that the integration test is "a pretty easy standard," that it "looks like FMPA has such [integrated] facilities in the Florida region," and that he "is not sure why [a showing of additional benefits from FMPA's transmission] wasn't made in this case." Pet. App. F-1 to F-2.

The court of appeals affirmed the Commission,[2] stating:

> So what did FERC mean when it said that FMPA neither argued nor presented sufficient evidence of integration? *We have no idea.* The Commission's brief provides no explanation, nor was agency counsel able to do so at oral argument. This enigma is not fatal, however, for under our deferential standard of review, we uphold agency decisions if supported by substantial evidence, 'notwithstanding their expository shortcomings.' *Pan-Alberta Gas, Ltd. v. FERC,* 251 F.3d 173, 176 (D.C. Cir. 2001).

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[2] The court of appeals had jurisdiction pursuant to the Federal Power Act, Section 313(b), 16 U.S.C. §825l(b) (2000). The FERC had jurisdiction under the Federal Power Act, Sections 206 and 211-212, 16 U.S.C. §§ 824e, j-k. Pet. App. E-1 to E-16.

Pet. App. A-9 (emphasis supplied). Ignoring the FERC's clear admission that it had not considered FMPA's arguments, (the agency having held erroneously that FMPA had presented no such argument), the court of appeals found, "Other statements in [the 2001 Rehearing Order], however, indicate that FERC understood FMPA's arguments and its evidence, but found them insufficient..." Pet. App. A-9. Rehearing *en banc* was denied. Pet App C-1 to C-2.

FMPA petitions for review by this Court.

REASONS FOR GRANTING THE WRIT

Supreme Court review is warranted because the court of appeals' decision overturns basic and previously well understood requirements for the review of administrative agency decisions: that an agency decision must be affirmed or overturned based on the grounds stated by the agency in its decision. This case is also worthy of the Court's review because the decision fundamentally changes the role of courts and agencies. The court abandons the clear import of agency language and substitutes its guess as to the basis of the exercise of agency discretion. If permitted to stand, the D.C. Circuit's decision will be a large step down a path that fundamentally undermines the proper role of judicial review of agency actions.

The court of appeals recognized that the FERC's statement "that FMPA neither argued nor presented sufficient evidence of integration" was wrong. Pet. App. A-9. The court purports to find contradictory language that supports an interpretation, albeit a strained interpretation, that the FERC did consider FMPA's arguments. *Id.* Read most generously, the court's review shows ambiguity as to whether the FERC considered FMPA's arguments, or, instead, as FERC said,

whether it did not know that such arguments existed.[3] Even if there is ambiguity, a remand was required so that FERC could say what it meant rather than have a reviewing court determine what was in the FERC's mind. Parties have a right to know that their evidence and arguments have been heard.

The conflict between the proper function of a court reviewing an agency decision and what the court of appeals in fact did is most starkly illustrated by the following hypothetical. Assume at one point in its opinion the agency had stated, "We have reviewed the petitioner's arguments on rehearing concerning issue X and find them lacking for reasons stated in our prior order," and elsewhere it had stated, "We deny rehearing because petitioner has raised no arguments on rehearing concerning issue X." The reviewing court is not allowed to resolve this conflict (necessarily based on its own intuition or guess), but must remand to the agency. Even giving the court of appeals every benefit of the doubt, this was the situation before the D.C. Circuit. In resolving the conflict between the FERC's clear language that FMPA did not argue integration and the (marginal) possibility based on other language in the FERC's opinion that the FERC considered FMPA's arguments, the court finds that the FERC did consider FMPA's arguments. In doing so, it trespassed on the duty of the agency to render an intelligible, reasoned decision and substituted its own view for the (unknowable) view of the agency.

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[3] Where the agency does not know what was in the record, the decision cannot be said to have been based upon the "whole record," as the Administrative Procedure Act requires, and must be considered, in the most literal sense, to be "arbitrary" and "capricious." Administrative Procedure Act, 5 U.S.C. § 706; Pet. App. E-20 to E-21. *See* U.S. Const. amend. V, Pet. App. E-22; *NLRB v. Universal Camera,* 340 U.S. 474, 482 (1951).

I. THE COURT OF APPEALS IMPROPERLY SUBSTITUTED ITS GUESS AS TO THE COMMISSION'S BASIS FOR DECISION FOR THE COMMISSION'S CLEAR STATEMENT.

Reviewing courts must affirm or remand based on the validity of the reasons given by the agency. Heretofore, it has been clear that agencies speak only through their decisions and cannot be affirmed based on what they have not stated. *E.g., SEC v. Chenery Corp.*, 318 U.S. 80 (1943); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). Where agency decisions are unclear, courts or counsel may not supply possible answers to cure the deficiency. *Burlington Truck Lines, Inc.*, 371 U.S. at 168 ("The courts may not accept appellate counsel's *post hoc* rationalizations for agency action."); *Chenery Corp.*, 318 U.S. at 87 ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."); *FPC v. Texaco*, 417 U.S. 380, 397 (1974) (despite Commission's assertions of intended meaning, ambiguity in the order required remand). Where an agency's decision is in error, it is the duty of the courts to lay the error bare and remand to the agency *so that the agency may correct its error*, not to decide *itself* what the agency should have or must have meant. "[T]he guiding principle . . . is that the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration." *FPC v. Idaho Power Co.*, 344 U.S. 17, 20 (1952). "For purposes of affirming no less than reversing its order, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." *Chenery Corp.*, 318 U.S. at 88. *Burlington Truck Lines, Inc.*, 371 U.S. at 169; *Idaho Power Co.*, 344 U.S. at 21; *FTC v. Morton Salt Co.*, 334 U.S. 37, 55 (1948). The court of appeals' decision violates these basic precepts.

In this case, the nation's preeminent court of appeals on administrative matters chose to disregard a clear statement of the FERC, which required remand, that a party had not presented argument when it had. After stating that it had "no idea" of what the Commission's statement meant, the court proceeded to search the remainder of the Commission's order and the record in order to construct its own rationale (*i.e.*, that "FERC [had] understood FMPA's arguments") to support denial of the petition for review. Pet. App. A-9 to A-13. This mutilation of the fundamental rule that an administrative agency can be affirmed only on the basis it has articulated and that the court may not construct its own rationale for affirmance requires reversal in order to preserve basic tenets of administrative law.

Here, the FERC plainly stated in its order on remand "FMPA [does not] even argue, that its facilities meet the test" of integration. Pet. App. B-6. The court of appeals admits that on the question of what the FERC meant "when it said that FMPA neither argued nor presented sufficient evidence of integration," it has "no idea." Pet. App. A-9. At this point a remand was required. Agency action "is arbitrary and capricious if the agency ... ignores important arguments..." *Natural Resources Defense Council v. EPA,* 822 F.2d 104, 111 (D.C. Cir. 1987).

The FERC's opinion is unequivocal that FMPA's petition for rehearing presented no argument on the crucial point for decision. Pet. App. B-6. No party disputes the fact that such argument was presented. A decision rendered in total ignorance of a party's argument certainly requires a remand. However, referring to the FERC's recitation of the history of the proceedings, a recitation which occurs prior to what the Commission terms the "discussion" of the petition for rehearing on which it ruled, the court finds that the FERC's plain statement of ignorance that FMPA had presented no

argument on the critical issue was of no moment because the *court* finds "that FERC understood FMPA's arguments and its evidence." Pet. App. A-9. Based upon its divination of this asserted fact, the court finds that there was "substantial evidence" in the record to support the Commission's result. *Id.* Of course, after considering all the evidence and arguments, the FERC might have reached the same result – or it might have ruled differently. One does not know, which is why a remand is required. The court's action of not remanding when there is error or unresolvable ambiguity, changes profoundly the role of courts and agencies.

In its opinion, the court of appeals recognizes that the FERC's statement that "FMPA has not demonstrated, nor does FMPA even argue" integration was incorrect. Pet. App. A-9. The court said that the statement was not explained in "the Commission's brief" nor "was Commission counsel able to do so on oral argument," but it then asserts, "This enigma is not fatal, however, for under our differential standard of review, we uphold agency decisions if supported by substantial evidence, 'notwithstanding their expository shortcomings.' *Pan-Alberta Gas, Ltd. v. FERC*, 251 F.3d 173, 176 (D.C. Cir. 2001)." *Id.* The court nowhere explains why it is free to ignore the FERC's clear, erroneous statement that no argument was offered and find the contrary based upon other far less germane statements in the FERC's order.

There is no expository shortcoming in the Commission's opinion. The FERC's statement is as plain as the English language permits. The FERC did not consider FMPA's arguments because it did not know that the arguments were before it. Rather than accept the FERC's plain statement, the court treats it as meaningless and constructs what it believes to be a supportable opinion out of other fragments of the FERC's order, although these do not contradict the FERC's statement that no argument on the point has been offered.

The court extends the concept of a deferential standard of review to impermissibly permit it to ignore what the agency has clearly stated and to construct a ground for rejecting FMPA's petition for review which was not the Commission's. By its own statement, the Commission did not consider FMPA's arguments so there was no way for the court to know whether, if the Commission had known, it would have looked at FMPA's evidence and argument in the same way. The FERC's admission that it did not know of FMPA's arguments is nowhere contradicted in FERC's order. However, even assuming, *arguendo*, that the court of appeals was somehow correct that other portions of the Commission's decision contradicted its statement that petitioner had presented no argument, the court was required to remand for an explanation by the Commission rather than to select certain segments of the opinion while ignoring a clear statement to the contrary. The court's finding that the FERC knew of FMPA's arguments, when the FERC said that FMPA had not argued the integration of its transmission, requires an act of clairvoyance that is beyond the legitimate role of the reviewing court.

The gravity of the Commission's, or more likely its staff's, failure to be aware of FMPA's arguments is hammered home by the statement of Commissioner, later Chairman, Wood explaining that he was voting against FMPA because of its failure to present its case. Pet. App. F-1 to F-2.[4]

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[4] There are other strong indications that the FERC would have ruled differently had it been aware of FMPA's evidence. *See, e.g., Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design*, 67 Fed. Reg. 55,451 (proposed July 31, 2002) (to be codified at 18 C.F.R. pt. 35) ("SMD-Rulemaking," proposing abandonment of Commission "integration" test and substituting objective test); *Entergy Services, Inc. v. FERC*, 319 F.3d 536

At a minimum, the court should have found it ambiguous whether the FERC did in fact consider FMPA's arguments. A remand was required so that the FERC, rather than the court, could explain the basis of the FERC's decision. *E.g., United States v. Chicago, M., St. P. & P.R. Co.*, 294 U.S. 499, 511 (1935) ("We must know what a decision means before the duty becomes ours to say whether it is right or wrong."); *Chenery Corp.*, 318 U.S. at 87; *Idaho Power Co.*, 344 U.S. at 20; *Morton Salt Co.*, 334 U.S. at 54. It is impossible to tell how the Commission would have resolved the perceived ambiguity. When the court found error or at best lack of clarity and did not remand, it prevented the FERC from correcting its error and reaching its own decision. When the court undertook to itself examine the record to support the agency decision without knowing what the agency would have decided if it had considered FMPA's evidence in light of its arguments, it displaced the Commission.

If the agency's clear statement that it was unaware that petitioner had presented argument is credited, as it should be, remand is required. If there is other language in the FERC's decision suggesting that the FERC was aware of petitioner's argument, there must be a remand to permit the agency to clarify what it meant.

II. SUMMARY REVERSAL IS APPROPRIATE.

To repair basic harm to the settled fabric of the law of judicial review of administrative decisions, this petition should be granted. Indeed, having contravened the most

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(D.C. Cir. 2003) (Customer-owned facilities connecting generation to the grid entitled to credits); *California Indep. Sys. Operator Corp.*, 103 F.E.R.C. ¶ 61,114 (2003) (customers having generators operating more than half the time charged based on actual transmission use instead of total demand or "load").

basic principles of law that party arguments and evidence must be considered, that agencies must be affirmed only based upon grounds given by the agencies themselves, and that when they find agency error, reviewing courts must remand to the agency so that the agency may correct its error, the court of appeals should be summarily reversed. The court of appeals was required to remand where, to be charitable, it was questionable whether the agency was aware that petitioner had presented any argument on the key issue for agency decision. Summary reversal is thus appropriate. At minimum, the petition should be granted and full review ordered.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 19, 2002 Decided January 21, 2003

No. 01-1381

Florida Municipal Power Agency,
Petitioner

v.

Federal Energy Regulatory Commission,
Respondent

Florida Power & Light Company,
Intervenor

On Petition for Review of Orders of the
Federal Energy Regulatory Commission

Robert A. Jablon argued the cause for petitioner. With him on the briefs was Daniel I. Davidson.

Judith A. Albert, Attorney, Federal Energy Regulatory Commission, argued the cause for respondent. With her on the brief were Cynthia A. Marlette, General Counsel, and Dennis Lane, Solicitor.

Clifford (Mike) Naeve was on the brief for intervenor.

Before: Sentelle, Henderson and Tatel, Circuit Judges.

Opinion for the Court filed by Circuit Judge Tatel.

Tatel, Circuit Judge: Granted access to Florida Power & Light's electricity transmission lines for the purpose of establishing network transmission service, Petitioner Florida Municipal Power Agency challenges three decisions of the Federal Energy Regulatory Commission rejecting its request for pricing credits. Finding the Commission's decisions supported by substantial evidence and neither arbitrary nor capricious, we deny the petition.

I.

After determining that utilities were discriminatorily denying power suppliers access to electricity transmission lines, the Federal Energy Regulatory Commission issued Order No. 888 requiring public utilities that own, control, or operate transmission facilities to file open access tariffs under which they agree to provide non-discriminatory access to their transmission networks in addition to the point-to-point service they had been offering. Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, F.E.R.C. Stats. & Regs. p 31,036, 61 Fed. Reg. 21540, 21541 (1996), clarified, 76 F.E.R.C. p 61,009 and 76 F.E.R.C. p 61,347 (1996), modified, Order No. 888-A, F.E.R.C. Stats. & Regs. p 31,048, 62 Fed. Reg. 12,274 (1997), order on reh'g, Order No. 888-B, 81 F.E.R.C. p 61,248, 62 Fed. Reg. 64,688 (1997), order on reh'g, Order No. 888-C, 82 F.E.R.C. p 61,046 (1998), aff'd Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C.

Cir. 2000) (per curiam) ("TAPS"), aff'd, New York v. FERC, 535 U.S. 1 (2002). In point-to-point transmission service, utilities pay for energy transmission from designated points of receipt to designated points of delivery. TAPS, 225 F.3d at 725 n.12. As Order No. 888 explains, however, "[n]etwork service allows more flexibility by allowing a transmission customer to use the entire transmission network to provide generation service for specified resources and specified loads without having to pay multiple charges for each resource-load pairing." Order No. 888, 61 Fed. Reg. at 21,547 n.65. Thus, unlike point-to-point service, network service permits a utility using another utility's transmission lines "to fully integrate load [(the total demand for service on a utility system)] and resources on an instantaneous basis in a manner similar to the transmission owner's integration of its own load and resources." Id. at 1,547.

Three additional features of Order No. 888 are relevant to this case. First, the order requires load ratio pricing for network transmission service, a form of transmission that "provides the customer with the same full system ability for transmitting power as the transmission owner." TAPS, 225 F.3d at 725. "Under load ratio pricing, the costs of the transmission system are allocated on the basis of the ratio of the network customer's load to the transmission provider's entire load on its transmission system." Respondent's Br. at 7.

The second relevant principle from Order No. 888 responded to arguments made by utility customers (like Petitioner Florida Municipal Power Agency (FMPA)) that because some customers sell power in a way that does not bear on network resources--known as behind-the-meter

generation--load ratio pricing's use of total load for determining a customer's rate might require payment for unneeded network transmission. TAPS, 225 F.3d at 725-26. These transmission customers thought they should therefore receive pricing credits for all behind-the-meter facilities. Id. FERC agreed in part. Although holding that customers were entitled to pricing credits for facilities "integrated" into the transmission network, the Commission cautioned that "[t]he fact that a transmission customer's facilities may be interconnected with a transmission provider's system does not prove that the two systems comprise an integrated whole such that the transmission provider is able to provide transmission service to itself or other transmission customers over those facilities--a key requirement of integration." Order No. 888, 61 Fed. Reg. at 21,630 (emphasis in original). "[F]or a customer to be eligible for a credit," FERC explained, "its facilities must not only be integrated with the transmission provider's system, but must also provide additional benefits to the transmission grid in terms of capability and reliability, and be relied upon for the coordinated operation of the grid." Order No. 888-A, 62 Fed. Reg. at 12,330. In other words, FERC would determine credits on a case-by-case basis.

Third, Order No. 888 adopts the principle of "comparability," meaning that the same integration standard that applies to transmission customers for the purpose of determining eligibility for pricing credits also applies to transmission providers for rate determination purposes. Order No. 888, 61 Fed. Reg. at 21,630 n.452. Thus, if a transmission provider includes a facility in its rate base, then its transmission customers may receive rate credits for any similarly situated facilities.

Running parallel to the development of Order No. 888, and in many respects providing a basis for it, this case began in 1993 when FMPA, a nonprofit public agency that provides point-to-point electric power supply to its twenty-nine member cities that sell retail electricity to the public, developed a plan for offering network transmission service. FMPA requested the right to purchase transmission service from Intervenor Florida Power & Light, owner of the state's largest transmission system. When Florida Power rejected that request, FMPA filed a complaint with FERC. Granting FMPA's request for network transmission service, FERC ordered the parties to agree on rates, conditions, and terms of service within sixty days. Fla. Mun. Power Agency v. Fla. Power & Light Co., 65 F.E.R.C. p 61,125 (1993), reh'g dismissed, 65 F.E.R.C. p 61,372 (1993).

When FMPA and Florida Power failed to reach an agreement, FERC issued a final order addressing cost-of-service issues. Fla. Mun. Power Agency v. Fla. Power & Light Co., 67 F.E.R.C. p 61,167 (1994) ("FMPA I"). Foreshadowing Order No. 888, FERC adopted Florida Power's load ratio pricing proposal, but agreed that in certain circumstances FMPA might be entitled to pricing credits for facilities that are "integrated" into Florida Power's network. The Commission explained:

> If FMPA has transmission facilities that will operate as part of the integrated transmission system, a credit would be reasonable. Indeed, this is in line with Florida Power's position that it is redefining the native load served by the Florida Power transmission system to include all of FMPA's resources and loads. If FMPA owns grid

> facilities that are now used to integrate the same resources andloads, those facilities are part of the integrated transmission system, and Florida Power must include an appropriate credit for any such grid facilities when it submits its compliance filing in this case.

Id. at 61,482 n.76.

In 1996, acting on several requests for rehearing, FERC rejected FMPA's argument that Florida Power had improperly refused to grant FMPA pricing credits, holding that none of FMPA's facilities was integrated into Florida Power's network. Fla. Mun. Power Agency v. Fla. Power & Light, 74 F.E.R.C. p 61,006 (1996) ("FMPA II"). At the same time, FERC recognized the comparability principle that later found its way into Order No. 888: "Just as FMPA cannot obtain credit for facilities not used by Florida Power to provide service, so Florida Power cannot charge FMPA for facilities not used to provide transmission service." Id. at 61,010 n.48.

In FMPA II, FERC rejected FMPA's request to supplement the record to include evidence relating to a facility FMPA operates in Lake Worth, Florida, as well as evidence relating to the "Rate Case." Id. at 61,007. The latter refers to a separately docketed FERC proceeding that began in 1993 when Florida Power filed a proposed tariff adjustment that would have affected the prices it charged transmission users, including FMPA. Fla. Power & Light Co., 64 F.E.R.C. p 61,361 (1993). Although Florida Power and FMPA reached a settlement, that settlement did not resolve FMPA's claim that Florida Power's rate base should be adjusted to exclude facilities that are not "integrated" with

the rest of Florida Power's transmission system. Fla. Power & Light Co., 92 F.E.R.C. p 61,241 (2000). This issue, referred to as a "reserved issue," remains pending before the Commission. Respondent's Br. at 10. In FMPA II, therefore, FERC denied FMPA's request that "if the Commission rejects the proposed credits for FMPA facilities, Florida Power be directed to exclude from its transmission rates the cost of transmission facilities that FMPA believes are not part of the integrated grid...." FMPA II, 74 F.E.R.C. at 61,010 n.48. "This issue," the Commission explained, "is among the rate issues being litigated in the Rate Case, and the parties have agreed that all rate issues will be resolved in the Rate Case." Id.

Finally, in FMPA III, the Commission denied FMPA's second petition for rehearing. Fla. Mun. Power Agency v. Fla. Power & Light, Co., 96 F.E.R.C. p 61,130 (2001). Rejecting FMPA's request for pricing credits, FERC again held that FMPA failed to demonstrate that its facilities were integrated into Florida Power's network. Id. at 61,545. FERC also ruled that FMPA's contention that the Commission should "reduce the Florida Power rate base to be consistent with a disallowance of FMPA facilities that are necessary to connect generation and load," fell outside the scope of the instant proceeding. Id. Noting FMPA's argument that the rate base reduction issue "was among the reserved issues in the settlement proceeding," FERC explained that "the reservation of an issue in one proceeding does not operate to transfer such issue to another proceeding." Id.

II.

FMPA now challenges the Commission's denial of pricing credits in FMPA I, FMPA II, and FMPA III. We review FERC's orders under the arbitrary and capricious standard and uphold FERC's factual findings if supported by substantial evidence. See, e.g., Pacific Gas & Elec. Co. v. FERC, 306 F.3d 1112, 1115 (D.C. Cir. 2002); Process Gas Consumers Grp. v. FERC, 292 F.3d 831, 836 (D.C. Cir. 2002). "The 'substantial evidence' standard," we have explained, "requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence." FPL Energy Me. Hydro LLC v. FERC, 287 F.3d 1151, 1160 (D.C. Cir. 2002) (internal citation omitted).

FMPA argues that the Commission erred by excluding evidence from the Rate Case, or alternatively, that it improperly refused to consolidate the Rate Case with the FMPA cases. As to its first argument, FMPA claims not that the excluded evidence pertains directly to the integration of its facilities, but rather that FERC has allowed Florida Power to include facilities in its rate base that are identical to FMPA facilities in terms of network benefits. According to FMPA, because the comparability principle requires equal treatment of transmission providers and users, the Commission must grant FMPA credit for facilities similar to ones the Commission allowed Florida Power to include in its rate base. We disagree.

To begin with, FMPA never argues--fatally for its position--that Rate Case evidence directly establishes that its facilities are integrated into Florida Power's network. Moreover, even if FERC treats FMPA facilities differently from similar Florida Power facilities, the Commission's denial of pricing credits does not violate the comparability

principle for an obvious reason: FERC has yet to rule on FMPA's request for reductions in Florida Power's rate base. See Petitioner's Br. at 16 (noting that the Commission has not ruled on reductions in Florida Power's rate base). "As a theoretical matter," FMPA concedes, "FERC could order relief in the Rate Case." Petitioner's Br. at 20. Theoretical? That FERC "could order relief in the Rate Case" is dispositive. Until FERC resolves FMPA's request for reductions in Florida Power's rate base (one of the "reserved issues"), FERC's denial of pricing credits cannot violate the comparability principle. FERC's exclusion of Rate Case evidence was thus
not an abuse of discretion.

Nor did FERC improperly refuse to consolidate the Rate Case with the FMPA proceedings. Administrative agencies enjoy "broad discretion" to manage their own dockets, Telecomm. Resellers Assoc. v. FCC, 141 F.3d 1193, 1196 (D.C. Cir. 1998), and FMPA offers no reason to believe that FERC abused that discretion in this case. Even if, as FMPA claims, FERC has unreasonably delayed deciding the Rate Case, the place for resolving that issue is there, not here.

FMPA next argues that FERC ignored evidence demonstrating the integration of its facilities with those of Florida Power's. This contention appears to rest almost entirely on FERC's statement in FMPA III that "FMPA has not demonstrated, nor does FMPA even argue, that its facilities meet the [integration] test." FMPA III, 96 F.E.R.C. at 61,545. "These statements," FMPA insists, "show that FERC was unaware of and, therefore, could not have considered basic evidence and argument of integration." Petitioner's Br. at 21. Other statements in FMPA III,

however, indicate that FERC understood FMPA's arguments and its evidence, but found them insufficient to justify granting credits. "The key issue in the case," the Commission wrote in FMPA III, "is whether FMPA's facilities are integrated with Florida Power's transmission system.... In FMPA II, the Commission found that a credit was not appropriate." FMPA III, 96 F.E.R.C. at 61,543. The Commission also discussed its core finding in FMPA II that FMPA's facilities are "interconnected with Florida Power's facilities[,] ... not integrated" with them. Id. Because FMPA presented no new evidence of integration in FMPA III--a point FMPA counsel conceded at oral argument--FERC's reliance on findings and conclusions from FMPA II was entirely appropriate.

So what did FERC mean when it said that FMPA neither argued nor presented sufficient evidence of integration? We have no idea. The Commission's brief provides no explanation, nor was agency counsel able to do so at oral argument. This enigma is not fatal, however, for under our deferential standard of review, we uphold agency decisions if supported by substantial evidence, "notwithstanding their expository shortcomings." Pan-Alberta Gas, Ltd. v. FERC, 251 F.3d 173, 176 (D.C. Cir. 2001).

Here, substantial evidence supports FERC's denial of pricing credits. Florida Power's expert testified that five of the seven FMPA cities at issue--Key West, Lake Worth, Clewiston, Green Cove Springs, and Jacksonville Beach--"are interconnected only with the [Florida Power] transmission system" and that each city is essentially a " 'dead-end' off the [Florida Power] system, in that ... power delivered from the Florida Power transmission system

necessarily must be consumed wholly within the city." Third Adjemian Aff. p 7. The expert also testified that the five FMPA facilities provide no benefit to the Florida Power network: "[W]hile the internal facilities enable each utility to distribute power within its own system, the facilities in no way reduce [Florida Power's] costs in integrating the loads of each city with all of FMPA's other network resources because they do not impact the facilities required by [Florida Power] to transmit power to and from these utilities." Id. p 16. Although FMPA's other two cities--Ft. Pierce and Vero Beach--interconnect to Florida Power's network at multiple points, Florida Power's expert testified that those "facilities do not reduce [Florida Power's] costs in providing network transmission service because the [Ft. Pierce-Vero Beach] line has a negligible electrical impact on [Florida Power's] ability to transmit power to and from the two cities." Id. p 18. It is true, as FMPA points out, that the expert also testified that "a negligible amount of power can flow over the line," but the expert further explained that this flow provided no benefit to Florida Power because "even without the line, [Florida Power] is able to deliver power to retail customers in that area and to transmit power to [Florida Power's] other load centers in South Florida." Third Adjemian Aff. p 19. According to FMPA, Florida Power relied on the Ft. Pierce-Vero Beach line during a planned transmission system outage, but Florida Power presented evidence that the line may not actually have assisted its network and that it had sufficient capacity to serve its customers during the outage. See Fourth Adjemian Aff. at p p 2-7; Birch Aff. p p 7, 10.

Based on this and other record evidence, FERC concluded that "[t]he transmission facilities of most FMPA members are interconnected with the Florida Power transmission system at

single points that are used only to transfer power between the Florida Power transmission system and each FMPA member's transmission system." FMPA II, 74 F.E.R.C. at 61,010. The Commission further explained:

> While the FMPA facilities may serve a transmission function on the FMPA side of the interconnection point between FMPA and the Florida Power system, they are not used by Florida Power to provide transmission service to FMPA or any other party. Nor are they used to transmit Florida Power's power to its non-FMPA customers.

Id. Crediting Florida Power's expert regarding the Ft. Pierce-Vero Beach lines, FERC also concluded that the lines were not integrated because they provided, at best, "unneeded redundancy" with Florida Power's network. Id. The Commission explained, "[a]n integrated transmission system (as opposed to two interconnected transmission systems) is comprised of transmission facilities operated as part of the same network, integrating all resources and loads on that network." Id.

To be sure, FMPA points to some contradictory evidence. See Petitioner's Br. at 22-23 (arguing that FMPA facilities benefit Florida Power by increasing reliability and that the Ft. Pierce-Vero Beach lines allow Florida Power to sell power in South Florida, increase Florida power grid capacity, and

effect Florida Power planning). The question we must answer, however, is not whether record evidence supports FMPA's version of events, but whether it supports FERC's. Ark. Elec. Energy Consumers v. FERC, 290 F.3d 362, 367 (D.C. Cir. 2002) (explaining court's limited role in reviewing FERC decision under "substantial evidence" standard). Applying our deferential standard of review--a particularly deferential standard where, as here, FERC decided between "disputing expert witnesses," Wis. Valley Improvement Co. v. FERC, 236 F.3d 738, 746-47 (D.C. Cir. 2001)--we have no doubt that the Commission's decision to deny credits is supported by substantial evidence. See supra pp. 9-11.

FMPA's remaining challenges are equally unpersuasive. FMPA says that FERC failed to consider evidence regarding Key West. But the lone document FMPA cites never mentions Key West; instead, it discusses FMPA's general arguments regarding integration which FERC addressed in FMPA II. See Fourth Malmsjo Aff. p 19. FMPA says that FERC improperly rejected its motion to lodge Florida Power's proposal to buy the Lake Worth utility (allegedly showing that Florida Power would have included Lake Worth in its rate base) and ignored Breaker Diagrams showing the configuration of Florida Power's system. But because both the Lake Worth evidence and the Breaker Diagrams relate to Florida Power's rate base, not to the integration of FMPA's facilities, FERC properly excluded them for the same reason that it properly excluded the rest of the Rate Case evidence. See supra pp. 7-8. FMPA says that the Commission applies the integration standard inconsistently, but we rejected just that argument in TAPS. See TAPS, 225 F.3d at 726-27 (describing FERC's discussion of integration in FMPA I and FMPA II as

"completely consistent with the Commission's resolution of the credits issue in the proceedings before us").

Finally, FMPA argues that FERC's recently published Standard Market Design Notice of Proposed Rule Making, see Remedying Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design, 67 Fed. Reg. 55452 (Aug. 29, 2002) ("SMD-NPRM"), "appears to reflect a significant shift in Commission policy," Petitioner's Rep. Br. at 6-10, regarding the integration standard, thus requiring remand pursuant to Williston Basin Interstate Pipeline Co. v. FERC, 165 F.3d 54, 62-63 (D.C. Cir. 1999) (holding that agency's adoption of new rule during judicial proceeding requires immediate remand of pending cases involving discarded rule). The NPRM, however, expressly states that it does not resolve any issues relating to integration. "Which facilities will or will not be under a [Regional Transmission Organization's] operational control," the Commission explained, "does not predetermine transmission pricing, cost allocation, or rate design determinations...." SMD-NPRM, 67 Fed. Reg. at 55,500 n.173. In any event, and unlike the rule at issue in Williston, FERC has yet to finalize the NPRM. Even if, as FMPA suspects, FERC is applying the NPRM in other proceedings, adversely affected parties in those cases may challenge the Commission's actions pursuant to 16 U.S.C. s 825l(b).

The petition for review is denied.

So ordered.

APPENDIX B

AGENCY ORDERS BELOW

96 F.E.R.C. ¶ 61,130

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Curt Hébert, Jr., Chairman;
William L. Massey, Linda Breathitt,
Pat Wood, III and Nora Mead Brownell.

Florida Municipal Power Agency Docket Nos. TX93-4-004
v. EL93-51-003
Florida Power & Light Co.

ORDER DISMISSING AND DENYING PETITIONS FOR REHEARING

(Issued July 26, 2001)

On January 5, 1996, the Commission issued an order[1] in the above-captioned proceeding addressing requests for rehearing of an order[2] directing Florida Power & Light Company (Florida Power) to provide network transmission service to the Florida Municipal Power Agency (FMPA) pursuant to sections 211 and 212 of the Federal Power Act (FPA), as amended. Timely requests for rehearing and/or clarification of that order were filed by FMPA, Florida Power, and Seminole Electric Cooperative, Inc. (Seminole). The key issue in the case is whether FMPA's facilities are

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[1]Florida Municipal Power Agency v. Florida Power & Light Company, 74 FERC ¶ 61,006 (1996) (FMPA II).

[2]Florida Municipal Power Agency v. Florida Power & Light Company, 67 FERC ¶ 61,167 (1994) (FMPA I).

integrated with Florida Power's transmission system, such that FMPA would be entitled to receive credit against its load ratio share for transmission facilities owned by FMPA or its members. In FMPA II, the Commission found that a credit was not appropriate.

On April 2, 2001, the Commission issued an order[3] stating that the requests for rehearing and/or clarification filed in this proceeding may have become moot as a result of Order No. 888,[4] the settlement approved by the Commission in Florida Power & Light Company,[5] other Commission disposition of the issues, or changed circumstances. The April 2, 2001 order afforded the parties seeking rehearing and/or clarification an opportunity to show why the Commission should not terminate these proceedings as moot. That order further stated that if no responses were received, the Commission would terminate this proceeding.

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[3]Florida Municipal Power Agency v. Florida Power & Light Company, 95 FERC ¶ 61,001 (2001).

[4]Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996 ¶ 31,036, 61 Fed. Reg. 21,540 (1996), clarified, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1996), on reh'g, Order No. 888-A, FERC Statutes and Regulations, Regulations Preambles July 1996-December 2000 ¶ 31,048, 62 Fed. Reg. 12,274, clarified, 79 FERC ¶ 61,182 (1997), on reh'g, Order No. 888-B, 81 FERC ¶ 61,248, 62 Fed. Reg. 64,688 (1997), on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd sub nom., Transmission Access Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), cert. denied in pertinent part, 69 U.S.L.W. 3574 (U.S. February 26, 2001).

[5]92 FERC ¶ 61,241 (2000).

In response to the April 2, 2001 order, Florida Power filed comments in support of a finding that the requests are moot. Seminole did not file a response. FMPA filed a response contending that its request for rehearing was not moot. Since Florida Power agrees that its petition for rehearing is moot and Seminole did not file a response, the Commission is dismissing as moot those requests for rehearing. For the reasons discussed below, the Commission is denying the request for rehearing filed by FMPA.

FMPA Rehearing

Background

This case began with a complaint filed by FMPA on July 2, 1993 requesting that the Commission direct Florida Power to provide network transmission service to FMPA. On October 28, 1993, the Commission issued a Proposed Order finding that the relevant statutory standards had been satisfied and directed Florida Power to provide network transmission service to FMPA.[6]

On May 11, 1994, the Commission issued FMPA I, which, among other things, adopted, with some modifications, the load ratio pricing method proposed by Florida Power. The load ratio method allocates the costs of Florida Power's transmission system between Florida Power and FMPA based on the relative size of Florida Power's and

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[6] Florida Municipal Power Agency v. Florida Power & Light Company, 65 FERC ¶ 61,125 (1993) (Proposed Order), reh'g dismissed, 65 FERC ¶ 61,372 (1993).

FMPA's loads that are served by network transmission service. However, in FMPA I the Commission also stated:[7]

> If FMPA has transmission facilities that will operate as part of the integrated transmission system, a credit would be reasonable. ...If FMPA owns grid facilities that are now used to integrate [FMPA] resources and loads, those facilities are part of the integrated transmission system, and Florida Power must include an appropriate credit for any such grid facilities when it submits its compliance filing in the case.

In FMPA II, the Commission found that FMPA's facilities were not integrated with the transmission system of Florida Power, and that, therefore, a credit was not appropriate.[8] FMPA seeks rehearing of this ruling.

Procedural Matters

On May 17, 2001, Florida Power filed reply comments to FMPA's comments. Although Rule 213(a)(2) of the Commission's Rules of Practice and Procedure[9] generally does not permit such pleadings,[10] we will accept Florida Power's pleading because it helps clarify the issues under consideration in this proceeding.

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[7] 67 FERC ¶ 61,167 at 61,482 n. 76.

[8] 74 FERC ¶ 61,006 at 61,010.

[9] 18 C.F.R. § 385.213(a)(2) (2000).

[10] Florida Power's pleading, which was styled as reply comments, was tantamount to an answer to a request for rehearing.

Discussion

In FMPA II, the Commission recognized that FMPA (and its member cities) own transmission facilities in Florida that are interconnected with Florida Power's facilities.[11] We explained, however, that interconnection of facilities does not equate to integration. Based on the evidence submitted, we found that the FMPA facilities were not integrated into Florida Power's facilities, and that therefore a credit was not appropriate. We explained that the transmission facilities of the FMPA members were not used by Florida Power to provide transmission service.

In its request for rehearing and its response to the Commission's April 2, 2001 order, FMPA reiterates its claims that it is entitled to credits for its facilities, because FPMA's facilities are comparable to those of Florida Power. FMPA argues that to the extent that the grid is defined to include FMPA's loads, both Florida Power and FMPA transmission are necessary to serve those loads .

We disagree. In Order 888-A, the Commission elaborated on the criteria necessary to meet the system integration test. Specifically, the Commission stated the following:[12]

> [F]or a customer to be eligible for a credit, its facilities must not only be integrated with the transmission provider's system, but must also provide additional benefits to the transmission

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[11] 74 FERC at 61,010.

[12] Order No. 888-A at 30,271.

> grid in terms of capability and reliability, and be relied upon for the coordinated operation of the grid. . . . the fact that a transmission customer's facilities may be interconnected with a transmission provider's system does not prove that the two systems comprise an integrated whole such that the transmission provider is able to provide transmission service to itself or other transmission customers over these facilities.

FMPA has not demonstrated, nor does FMPA even argue, that its facilities meet the test. Neither does FMPA dispute the findings in FMPA II that the interconnections are primarily single points used only to transfer power between the Florida Power transmission system and that of each FMPA member. Accordingly, the Commission affirms its ruling in FMPA II.

Rate Base Adjustment

In the alternative, FMPA argues that it should receive a rate base adjustment to the extent that its facilities serve FMPA load without using the Florida Power transmission system. Otherwise, Florida Power would collect transmission revenues for serving load which is beyond the Florida Power transmission grid and which is supplied using others' transmission.

As another option, FMPA argues that the Commission could reduce the Florida Power rate base to be consistent with a disallowance of FMPA facilities that are necessary to connect generation and load. FMPA contends

that if customer transmission, generation and loads are considered to be beyond Florida Power's grid for purposes of determining eligibility for credits, then the same loads cannot be considered to be network loads on Florida Power's grid.

The Commission notes that the above arguments were raised by FMPA in FMPA II. There, the Commission found that excluding certain transmission facilities from Florida Power's rate base was outside the scope of the instant proceeding, but was among the issues being litigated in Florida Power's Rate Case in Docket No. ER93-465-000, et al.[13]

FMPA acknowledges that the issue of Florida Power's rate base, in general, was settled in the Docket No. ER93-465-000, et al. proceeding. However, FMPA states that the specific matter at issue here was not settled, but rather was among the reserved issues in the settlement proceeding.

The Commission reaffirms its decision in FMPA II that the rate base adjustment that FMPA seeks as alternative relief is outside the scope of the instant proceeding. We further reiterate that the reservation of an issue in one proceeding does not operate to transfer such issue to another proceeding.

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[13] Florida Power & Light Company, et al., 73 FERC ¶ 63,018 (1995) (initial decision); Florida Power & Light Company, et al., 92 FERC ¶ 61,241 (2000) (letter order approving uncontested settlement).

Request for Consolidation

FMPA seeks rehearing of the Commission's decision in FMPA II denying a request for consolidation of this proceeding with the rate proceeding in Docket No. ER93-465-000, et al. FMPA argues that consolidation of the cases, for the purpose of decision, would expedite a conclusion to the proceedings.

Florida Power opposes consolidation of the cases. Florida Power points out that in FMPA II, the Commission "decline[d] to incorporate into this proceeding any part of the Rate Case record."[14] Florida Power states that the record in this proceeding was developed separately from the record in the Rate Case, and that consolidation at this late stage in the proceeding would be prejudicial and unnecessary.

The Commission affirms its prior decision to not consolidate this proceeding with the Rate Case in Docket No. ER93-465-000, et al. Consolidation of the cases at this juncture, years after the proceedings commenced, could be prejudicial to Florida Power.

The Commission orders:

(A) The requests for rehearing and/or clarification filed by Florida Power & Light Company and Seminole Electric Cooperative, Inc. are dismissed, as moot.

(B) The request for rehearing filed by Florida Municipal Power Agency is denied.

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[14] 74 FERC at 61,007.

By the Commission.

(S E A L)

Linwood A. Watson, Jr.,
Acting Secretary

74 F.E.R.C. ¶ 61,006

FEDERAL ENERGY REGULATORY COMMISSION – ALJ

Before Commissioners: Elizabeth Anne Moler, Chair;
Vicky A. Bailey,
James J. Hoecker,
William L. Massey, and
Donald F. Santa, Jr.

Florida Municipal Power Agency

v. Docket Nos. TX93-4-002 and EL93-51-002

Florida Power & Light Company

ORDER GRANTING CLARIFICATION IN PART, DENYING REHEARING, AND ACCEPTING COMPLIANCE FILING AS MODIFIED

January 5, 1996

This order addresses requests for rehearing of an order (Final Order)[1] directing Florida Power & Light Company (Florida Power) to provide network transmission service to the Florida Municipal Power Agency (FMPA) pursuant to sections 211 and 212 of the Federal Power Act (FPA), as amended by the Energy Policy Act of 1992.[2] The Final Order also directed Florida Power to make a compliance filing. The compliance filing is contested. Because the issues on rehearing and on compliance overlap, we resolve both in this order.

We stress that our resolution of the issues in this order is without prejudice to resolution of some of the same issues in the final Open Access Rule.[3] After the final Open Access Rule is issued, either party may petition the Commission under section 211 to conform our decision here to any different decisions made in the final Open Access Rule.

I. Background

FMPA submitted an application requesting that the Commission direct Florida Power to provide network transmission service to FMPA. FMPA stated that it planned

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[1] Florida Municipal Power Agency v. Florida Power & Light Company, 67 FERC P61,167 (1994).

[2] 16 U.S.C. §§ 824j-824k (1994).

[3] See Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Notice and Supplemental Notice of Proposed Rulemaking, 60 Fed. Reg. 17,662 (April 7, 1995), IV FERC Stats. & Regs. P 32,514 (1995) (hereinafter Open Access NOPR).

to use the transmission service to fully integrate and coordinate its resources pursuant to its Integrated Dispatch and Operations Project (IDO Project).

The Commission issued a Proposed Order finding that the relevant statutory standards had been satisfied and directing Florida Power to provide network transmission service to FMPA.[4] The Proposed Order provided FMPA and Florida Power an opportunity to negotiate to resolve issues concerning the rates, terms and conditions of service. FMPA and Florida Power were able to resolve some, but not all, of the issues.

The Commission then issued the Final Order, which resolved the remaining issues, including the contentious issue of price. The Final Order adopted, with some modifications, the load ratio pricing method proposed by Florida Power. The load ratio method allocates the costs of Florida Power's transmission system between Florida Power and FMPA based on the relative size of Florida Power's and FMPA's loads that are served by network transmission service. The Final Order also directed Florida Power to make a compliance filing to conform with the Final Order.

FMPA, Florida Power, Duke Power Company (Duke), and Texas Utilities Power Company (Texas Utilities) filed requests for rehearing and/or clarification of the Final Order. The issues raised by the requests are addressed in the

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[4] Florida Municipal Power Agency v. Florida Power & Light Company, 65 FERC P61,125 (Proposed Order), reh'g dismissed, 65 FERC P61,372 (1993).

discussion section of this order. Florida Power filed a response to FMPA's motion for clarification.[5]

Florida Power submitted a compliance filing[6] containing a proposed Network Integration Service Agreement between Florida Power and FMPA (NIS) and a proposed Network Operating Agreement between Florida Power and FMPA (Operating Agreement). Notice of the compliance filing was published in the Federal Register,[7] with comments due on or before August 2, 1994.[8]

FMPA alleges that Florida Power's filing does not comply with the Commission's order in numerous ways.[9] Some of FMPA's concerns include: (1) Florida Power has failed to credit FMPA's grid facilities that are now used to integrate FMPA's resources and loads; (2) Florida Power's proposed contract provisions concerning use of interfaces fails to comply with the Final Order; and (3) cost-of-service

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[5] Florida Power's response was filed on June 27, 1994. It also responded to certain issues included in the various requests for rehearing. On July 1, 1994, FMPA filed a response to Florida Power's June 27, 1994 filing. FMPA argues that Florida Power's June 27, 1994 filing should be rejected as a prohibited response to a request for rehearing. If the Commission does not do so, then FMPA argues that fairness requires the Commission to accept FMPA's response to Florida Power's filing. Finally, on July 18, 1994, Florida Power submitted an answer to FMPA's July 1, 1994 filing.

[6] The compliance filing was submitted on July 11, 1994.

[7] 59 Fed. Reg. 37,750 (1994).

[8] The Commission granted FMPA's unopposed motion for extension of time to comment on the compliance filing until August 12, 1994. On August 2, 1994, Reedy Creek Improvement District (Reedy Creek) filed a motion to intervene, raising no substantive issues.

[9] FMPA's protest was filed on August 12, 1994.

issues and tariff language issues should be decided in the hearing proceeding in Florida Power's comprehensive rate proceeding.[10] FMPA's arguments are addressed in detail in the discussion section of this order.

Florida Power filed a response to FMPA's protest of the compliance filing (August 29 Response). Florida Power addresses crediting of FMPA's facilities, interface use, and the other issues addressed in FMPA's protest. Florida Power also insists that there is no reason to hold an evidentiary hearing. Because we are rejecting this pleading, we do not discuss it further.

FMPA filed a motion for leave to file a Sixth Affidavit of Albert B. Malmsjo (Sixth Affidavit).[11]

The parties also filed various procedural motions. FMPA filed a motion to lodge the "Florida Power & Light Company Proposal for the Purchase of the City of Lake Worth, Florida, Electric System" (Lake Worth Proposal),[12] as well as a copy of Lake Worth's Request for Proposals, which prompted Florida Power's Lake Worth Proposal.[13] According to FMPA, the City of Lake Worth is a proposed

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[10] Florida Power & Light Company, 66 FERC P61,227 (1994) (Policy Order), order on reh'g, 70 FERC P61,158 (1995), appeal pending, No. 95-1199 (D.C. Cir. filed Apr. 7, 1995) (Rate Proceeding). On December 13, 1995, in the Rate Proceeding, the presiding administrative law judge issued an Initial Decision on Comparability and Other Rate Issues. 73 FERC P63,018 (1995) (Initial Decision).

[11] Filed on September 8, 1984. FMPA explains that the Sixth Affidavit rebuts some of the allegations in Florida Power's August 29 Response.

[12] The Lake Worth Proposal is dated September 1, 1994.

[13] Filed on September 16, 1994.

member of FMPA's IDO project, for which FMPA has been seeking network transmission in this proceeding. FMPA contends that the Lake Worth Proposal is relevant to whether FMPA should receive credit for member-owned transmission facilities, including in Lake Worth. According to FMPA, whether Lake Worth will consider Florida Power's proposal reasonable will be influenced by Lake Worth's alternative power supply costs, which will depend upon the availability and pricing of network transmission.

Florida Power filed an answer in opposition to FMPA's motion to lodge the Lake Worth Proposal.[14] It argues that FMPA's chance to expand the record has passed and that the Lake Worth proposal is not relevant to this proceeding.

FMPA filed a motion to lodge a Nuclear Regulatory Commission (NRC) decision denying FMPA's request for an enforcement action requiring Florida Power to provide network transmission tariff service to FMPA; the NRC decision stated that it relied in part upon this Commission's Final Order.[15] Florida Power filed an answer[16] opposing FMPA's motion to lodge the NRC decision.

FMPA also filed a motion[17] requesting that the Commission: (1) consider this case in relation to the record in the ongoing case in the Rate Proceeding; (2) determine in this proceeding the key issues concerning FMPA's use of

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[14] Filed on October 3, 1994.
[15] Filed on June 22, 1995.
[16] Filed on July 7, 1995.
[17] Filed on July 5, 1995.

network transmission service for its IDO Project, specifically, the issues relating to credits for FMPA-owned transmission, use of interfaces, and FMPA's ability to use network transmission service while continuing its participation in the Florida Power Pool; and (3) attempt to rule on the issues that are common to both this proceeding and the proceeding in Docket Nos. ER93-465-007, et al. in order to provide guidance for the Initial Decision to be issued in that proceeding.

Seminole filed an answer stating that it does not oppose FMPA's July 5 motion.[18] However, if the Commission considers in this proceeding issues that are pending in the proceeding in Docket No. ER93-465-007, et al., Seminole requests permission to supplement the record in this proceeding with evidence adduced in the proceeding in Docket Nos. ER93-465-007, et al..

Florida Power filed an answer to FMPA's motion of July 5, 1995, and a response to Seminole's July 20, 1995 answer to FMPA's July 5 motion.[19] Florida Power does not oppose FMPA's motion to expedite this proceeding. However, Florida Power does oppose FMPA's and Seminole's requests that the Commission consider portions of the record in the Docket No. ER93-465-007, et al. proceeding here. Florida Power contends that the issues in that proceeding do not include FMPA's discrete request for section 211 network transmission service for its IDO project.

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[18] Filed on July 20, 1995.

[19] Florida Power's answer was filed on July 20, 1995; its response to Seminole's July 20 request was filed on July 31, 1995.

Florida Power suggests that FMPA improperly adduced into that record evidence on the IDO project that belong in this record. Florida Power contends that Seminole's request is even more inappropriate than FMPA's: Seminole has no requests for network service pending in this proceeding, and the Commission has limited the scope of participation of parties other than FMPA and Florida Power.[20]

FMPA filed a motion[21] requesting that the Commission order Florida Power to sell to FMPA network transmission service for service to the All Requirements members of its IDO project on an interim basis until after the Commission issues its final orders in this proceeding. Florida Power filed an answer[22] stating that it is willing to provide FMPA with network service under either: (1) the network service agreement presently on file, together with refund protection to meet FMPA's concern, or (2) a network service tariff that Florida Power will file in the immediate future that conforms to the Commission's pro forma network tariff.[23]

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[20] See 65 FERC P61,372 at p. 63,013 (1993).

[21] The motion was filed on October 24, 1995.

[22] The answer was filed on November 8, 1995.

[23] Florida Power filed a network service tariff on November 22, 1995 in Docket No. ER96-417-000 (Tariff Filing). On December 7, 1995, FMPA filed a statement concerning the implications of the Florida Power Tariff Filing. FMPA believes that the Tariff Filing renders moot the issues in this case that concern network tariff transmission terms and conditions, at least where the Tariff Filing tracks the pro forma tariffs contained in the Open Access NOPR. However, FMPA believes that certain critical issues concerning implementation of the tariff remain open and must be resolved in order for FMPA to assess the feasibility of using network transmission and of going forward with the full IDO Project. In

II. Discussion

A. Preliminary Matters

We will accept Florida Power's June 27, 1994 filing and FMPA's July 1, 1994 filing to the extent that they relate to the motions for clarification. However, we will reject Florida Power's July 18, 1994 filing and the parties' subsequent filings[24] to the extent that they are answers to requests for rehearing, answers to answers, or are otherwise barred by the Commission's Rules of Practice and Procedure.[25]

We will deny FMPA's motions to lodge the Lake Worth agreement. We will not expand the scope of this proceeding to include any agreement that the outcome of this case might affect. We will, however, accept the NRC decision into this record. Additionally, we decline to incorporate into this proceeding any part of the Rate Case record. In Footnote 32 of the Final Order, we referred to

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particular, FMPA remains concerned that Florida Power intends for FMPA to cease to participate in the Florida Municipal Power Pool (in a single control area) if FMPA purchases network transmission service from Florida Power. FMPA states further that, although it believes Florida Power in the Tariff Filing has agreed to credits for FMPA-owned transmission facilities, those credits still need to be quantified. Also, FMPA believes that the Tariff Filing moots issues in this proceeding as to tariff language, to the extent the Tariff Filing is consistent with the Open Access NOPR.

[24] Because the Sixth Affidavit of Albert B. Malmsjo (Sixth Malmsjo Affidavit) was submitted by FMPA mainly to rebut Florida Power's August 29, 1994 unauthorized answer to FMPA's protest, which we are rejecting, we also will reject the Sixth Malmsjo Affidavit.

[25] 18 C.F.R. § 385.213(a)(2) (1995).

FMPA's and Florida Power's agreement that cost-of-service issues not raised in this proceeding will be resolved in the Rate Case, and we stated that if we further modify cost-of-service principles in that docket, Florida Power will make conforming changes to the service provided in this proceeding, including making refunds with interest,[26] retroactive to the date on which service began.[27] We see no reason to supplement this record with evidence from the Rate Case, and we will deny Seminole's request. Further, FMPA's request for interim network service (and Florida Power's answer thereto) is moot by virtue of this order.

B. Credits for FMPA Transmission Facilities

1. The Final Order

In the Final Order, the Commission found that FMPA should receive a credit (for purposes of applying the load ratio method) for any transmission facilities that will operate as part of the combined FMPA/Florida Power transmission grid. The Commission stated: If FMPA has transmission facilities that will operate as part of the integrated transmission system, a credit would be reasonable. Indeed, this is in line with Florida Power's position that it is redefining the native load served by the Florida Power transmission system to include all of FMPA's resources and loads. If FMPA owns grid facilities that are now used to integrate the same resources and loads, those facilities are part of the integrated transmission system, and [Florida

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[26] See 18 C.F.R. § 35.19a (1995).
[27] See 67 FERC at p. 61,477.

Power] must include an appropriate credit for any such grid facilities when it submits its compliance filing in this case.[28]

FMPA has informed Florida Power that it is claiming a credit of $ 65 million annually, representing a 97 percent share (Florida Power's network transmission load ratio share) of the annual cost associated with all transmission facilities installed by FMPA members. Because FMPA's basic network transmission charge (based upon its three percent network transmission load ratio share) is only $ 31 million, FMPA concludes that Florida Power should provide FMPA with the network service at no charge.[29]

2. Rehearing Arguments

On rehearing, the parties continue to disagree over which, if any, FMPA facilities, if any, should qualify for a credit. According to FMPA: If FMPA and member generation and loads are beyond the [Florida Power] transmission network, then FMPA is serving member loads at least in part from generation which is also beyond the [Florida Power] transmission network, and FMPA should not be charged for transmission for such loads.[30]

Therefore, FMPA requests that the Commission clarify the scope of the integrated grid.[31] FMPA contends that the Final Order requires Florida Power to pay its load

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[28] 67 FERC at p. 61,482 & n.76 (Footnote 76).

[29] FMPA does not propose that Florida Power also pay FMPA the $ 34 million difference between the $ 65 million credit and the $ 31 million charge.

[30] FMPA rehearing at p. 5.

[31] FMPA rehearing at pp. 1-11.

ratio share (about 97 percent) of the cost of all FMPA transmission facilities. FMPA states that, for crediting purposes, the same standards should be used to classify FMPA-owned transmission facilities as are used to classify Florida Power-owned facilities.[32] Anticipating that Florida Power will argue that certain FMPA facilities do not benefit Florida Power, FMPA contends that it is erroneous to attempt to evaluate each facility to determine if that FMPA facility provides a benefit to Florida Power, because that would be inconsistent with Florida Power's practice of rolled-in pricing for transmission services provided by Florida Power.[33] FMPA argues that if a FMPA facility is part of the FMPA transmission grid, it must be presumed to benefit Florida Power (by increasing reliability).[34] FMPA contends that it would be unlawful to deny FMPA credits on the grounds that FMPA needs service over Florida Power's transmission system, but Florida Power does not need service over FMPA's transmission system.[35]

FMPA also submits a "conditional" request for rehearing, to be considered only if and to the extent the Commission rejects FMPA's proposed transmission use

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[32] For example, if Florida Power includes generator leads or radials in its transmission rate base, then FMPA should likewise receive credit for similar investments and on the same basis. FMPA rehearing at p. 5.

[33] Id. at p. 6.

[34] According to FMPA, its facilities benefit Florida Power by, for example, providing increased reliability through alternate paths (the Vero Beach/Fort Pierce line) and by transmitting power to and from the Florida Power transmission grid in support of the purchase or sale of power by Florida Power from or to FMPA member cities.

[35] FMPA rehearing at p. 9.

standard and/or does not allow local generation credits. FMPA continues to argue that it should be credited for using its own transmission resources to meet its own loads that are beyond the Florida Power grid.[36] FMPA repeats earlier arguments and adds that the Commission must consider the fact that FMPA has been forced to construct what it characterizes as duplicative and unnecessary transmission projects because of Florida Power's past anticompetitive actions, including its failure to honor nuclear licensing conditions which commit Florida Power to provide network transmission service.[37] FMPA "should not have to pay for transmission from local generation to loads where both the generation and the load it is serving are beyond the [Florida Power] transmission network."[38] FMPA characterizes network transmission service to those cities as non-firm transmission service that must be priced as such.[39]

Concerning cost allocation, FMPA contests the Commission's use of the entirety of FMPA's network loads rather than the maximum amount of energy being scheduled by FMPA for transmission in any single hour (about 240 MWh). FMPA restates its argument that a customer should not be forced to purchase more service than it wants, and FMPA only wants about 240 MW of service. If the

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[36] FMPA rehearing Appendix 1 (Conditional Rehearing) at pp. 3-4.
[37] Id. at pp. 6-8, 13-14.
[38] Id. at p. 8. FMPA states that the Cities of Key West, Lake Worth, Ft. Pierce and Vero Beach (all members of the IDO) have generation to serve load. FMPA maintains that this fact benefits Florida Power as well as FMPA. Id. at p. 10.
[39] Id. at pp. 10-11.

Commission does not grant FMPA the requested credits, then FMPA intends to go forward with its complaint in Docket No. EL93-51-000.[40]

Florida Power requests that the Commission state that crediting will be allowed only if an integrated Florida Power/FMPA grid exists and it is determined that the FMPA facilities that are part of that grid materially benefit Florida Power by deferring or eliminating construction of Florida Power's transmission facilities (thereby reducing Florida Power's cost of providing transmission service).[41] According to Florida Power, none of FMPA's facilities qualifies for a credit,[42] because historically the parties have separately planned, operated and dispatched their respective systems, a practice that will not change as a result of FMPA's plan to integrate its resources and loads using the Florida Power transmission system. Florida Power states that FMPA is seeking credit for all of the internal transmission facilities owned by FMPA members who are participating in the IDO Project. The facilities of FMPA's members are "internal" and cannot be used to integrate Florida Power's load. The configuration of FMPA's facilities shows that they are not integrated with Florida Power's facilities; IDO East member cities' facilities are of two types. First, the five cities (out of

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[40] Id. at p. 13, note 9. In the Final Order, we stated that we would establish further procedures to address the matters raised in FMPA's complaint only if they are not resolved in this proceeding. 67 FERC at p. 61,473 and n. 3. We are resolving the matter of credits for FMPA's transmission facilities in this proceeding. Accordingly, we are terminating Docket No. EL93-51-000 in this order.

[41] Florida Power rehearing at p. 2.

[42] Florida Power rehearing at pp. 2-19.

seven) that are located in Florida Power's service territory[43] are interconnected to Florida Power by a single interconnection that operates only as a distribution delivery point; that is, power delivered from the Florida Power transmission system must be wholly consumed within each of those member cities.[44] Thus, there can be no dispute that the internal transmission facilities of those five cities are not part of the Florida Power transmission system and will provide no benefit to Florida Power when FMPA commences its load integration. Florida Power states that the two other FMPA member cities located in its service area (Vero Beach and Ft. Pierce) are interconnected to each other through a 138 kV transmission line, which is also interconnected with Florida Power's 138 kV transmission system. Florida Power concedes that, because FMPA agreed to interconnect its 138 kV transmission line to the Florida Power transmission system, energy generated by Florida Power may flow over the Ft. Pierce/Vero Beach line at some point in time, but that this is simply an ordinary consequence of interconnected operations. Florida Power states, "That the interconnection is not part of [Florida Power's] grid is confirmed by the direct assignment of its costs to the cities of Vero Beach and Ft. Pierce."[45] Load flow studies show that the line does not benefit Florida Power by deferring or avoiding construction

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[43] Those five IDO East member cities are: Key West, Lake Worth, Clewiston, Green Cove Springs, and Jacksonville Beach. Florida Power rehearing, Adjemian Affidavit at p. 5.

[44] Florida Power rehearing at pp. 3-4. Thus, for transmission planning purposes, Florida Power treats those cities as a point of distribution on Florida Power's system. Id.

[45] Florida Power rehearing at pp. 12-13.

of any Florida Power facilities, so this line provides no basis for a credit, according to Florida Power.[46]

Florida Power emphasizes that nothing will change even after the IDO Project is implemented; Florida Power still will not use any of FMPA's transmission facilities to integrate Florida Power's generation with Florida Power's loads.[47]

Florida Power argues that transmission facilities must provide a "material" benefit if they are to be considered grid facilities eligible for a credit. Therefore, even if some FMPA transmission facilities are integrated with the Florida Power system, these facilities do not benefit Florida Power, because

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[46] Florida Power notes that the Commission has, in the past, rejected a credit for customer-owned facilities that were integrated with those of the transmission provider because: Although the CVP [the customer] and PG&E [the transmission provider] transmission systems may be "operationally" integrated, it has not been shown that PG&E materially benefits from CVP's transmission facilities, that PG&E has significantly avoided any transmission system costs as a result of CVP's system, or that the CVP system was designed as an integrated part of the PG&E system. Pacific Gas & Electric Company, Opinion No. 143, 20 FERC P61,190 at p. 61,370, order on clarification and denying rehearing, Opinion No. 143-A, 21 FERC P61,115 (1982) (PG&E). Florida Power's attempt to apply PG&E to this case is misplaced. In PG&E, the parties' contract reflected their agreement to "take into account substantial savings accruing to either party" as a result of using each other's transmission lines. See 20 FERC at p. 61,365. The parties simply could not agree on how to account for such savings. The Commission found that a credit would be an appropriate way, but that there was insufficient evidence of substantial savings as required by the contract.

[47] Florida Power rehearing at pp. 9-10.

they have not enabled Florida Power to avoid constructing grid facilities of its own.

3. Compliance

Consistent with its position on rehearing, Florida Power's compliance filing includes no credits for FMPA transmission facilities. In its protest to the compliance filing, FMPA reiterates its arguments on rehearing, and includes proposed additions to reflect credits.

4. Resolution

We decline to grant FMPA the requested credits; likewise, we will deny its conditional request for rehearing. We reject FMPA's argument that, because it must pay a rate reflecting the cost of all of Florida Power's transmission facilities, it is entitled to a credit reflecting the cost of all of FMPA's transmission facilities. The final order did not direct a merging of the parties' transmission systems or the operation of a joint transmission network. Rather, the final order directed Florida Power to provide service over the Florida Power transmission system under a rate reflecting a pro rata share of the costs of the Florida Power transmission system. The Commission held out the possibility of an appropriate credit for any FMPA resource that "will operate as part of the integrated transmission system." Contrary to FMPA's position, the fact that FMPA's facilities are interconnected with Florida Power's does not result in an integrated FMPA/Florida Power transmission system.

The issue is whether any of the FMPA facilities are integrated with the transmission system of Florida Power. On

the evidence submitted, we find that they are not and, therefore, a credit is not appropriate. The transmission facilities of most FMPA members are interconnected with the Florida Power transmission system at single points that are used only to transfer power between the Florida Power transmission system and each FMPA member's transmission system. While the FMPA facilities may serve a transmission function on the FMPA side of the interconnection point between FMPA and the Florida Power system, they are not used by Florida Power to provide transmission service to FMPA or any other party. Nor are they used to transmit Florida Power's power to its non-FMPA customers. The integration of facilities into the plans or operations of a transmitting utility is the proper test for cost recognition in such cases.[48] The mere fact that a section 211 requestor has previously constructed facilities is not sufficient to establish a right to credits.[49]

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[48] This fundamental cost allocation concept applies to Florida Power as well as FMPA. Just as FMPA cannot obtain credit for facilities not used by Florida Power to provide service, so Florida Power cannot charge FMPA for facilities not used to provide transmission service. We note FMPA's request that, if the Commission rejects the proposed credits for FMPA facilities, Florida Power be directed to exclude from its transmission rates the cost of transmission facilities that FMPA believes are not part of the integrated grid, such as generator leads. This issue is among the rate issues being litigated in the Rate Case, and the parties have agreed that all rate issues will be resolved in the Rate Case. In the recent Rate Proceeding Initial Decision, the presiding judge ruled on this issue. 73 FERC at pp. ___, slip op. at pp. 156-61. Of course, the Rate Proceeding is not yet final. We will, therefore, not address this issue here.

[49] As we did in the Final Order (see 67 FERC at p. 61,481 & n.74), we stress that our final rulings in this order are strictly limited to the facts of

The only remaining facility to be considered is the Ft. Pierce/Vero Beach transmission line. While this line was constructed primarily to connect two FMPA members, it is looped into the Florida Power system (connected to the Florida Power system at more than one point). FMPA argues, therefore, that the Ft. Pierce/Vero Beach line provides an alternate transmission path and increases reliability on the Florida Power transmission system. The fact that the Ft. Pierce/Vero Beach line constitutes a parallel path and is subject to occasional loop flow does not, in and of itself, compel a conclusion that the line now operates as part of the Florida Power integrated transmission network.[50] An integrated transmission system (as opposed to two interconnected transmission systems) is comprised of transmission facilities operated as part of the same network, integrating all resources and loads on that network.[51] While

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this case as presented by the parties. Other situations may exist where customers have constructed transmission facilities that are operated as part of the transmission provider's network or as part of a joint transmission system. Also, if in the future Florida Power and FMPA should agree that FMPA, rather than Florida Power, should construct facilities that would operate as part of the Florida Power network, an appropriate credit would be necessary.

[50] If such were the case, Florida Power would be required to offer credits to all transmission customers who happened to be interconnected to its system at more than one point.

[51] An example of a rate schedule providing for an integrated transmission system is the Georgia Integrated Transmission System Agreement among Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, and the City of Dalton, Georgia. See Southern Company Services, Inc., et al., 72 FERC P61,324 at p. 62,404 (1995), reh'g pending.

FMPA has the ability to use the Ft. Pierce/Vero Beach line to independently transmit power between its resources and loads, Florida Power will not be using the line to transmit power for itself or to provide transmission service to FMPA or any other Florida Power transmission customer. Also, while the Ft. Pierce/Vero Beach line may be redundant to certain facilities comprising the Florida Power network, unneeded redundancy provided by FMPA cannot qualify for a credit any more than an unnecessary Florida Power transmission facility could qualify for cost recovery.[52] In sum, because the Ft. Pierce/Vero Beach line is not used by Florida Power to provide transmission service to itself or others in the Florida Power control area, its existence has no effect on Florida Power's cost of providing service to any Florida Power customer, including FMPA. If, at some point in the future, the Ft. Pierce/Vero Beach line, any other existing FMPA line, or any new FMPA line is used by Florida Power to provide service to all customers on the Florida Power system, we will establish an appropriate credit for such FMPA facilities.

We acknowledge that FMPA may face higher transmission costs than it would have had it always been a network customer of Florida Power. For example, FMPA complains that it was forced to construct the Ft. Pierce/Vero Beach line because it could not obtain transmission service from Florida Power under satisfactory terms. That is, had it obtained network transmission service earlier, it could have avoided the expense of a line that may prove unnecessary to

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[52] See note 48, supra.

FMPA once Florida Power provides network transmission service. However, these facts do not support FMPA paying a decreased rate. Very simply, we must base FMPA's rates on the costs of Florida Power providing the requested service, not the costs that might have resulted if things had been different in the past. We note that, if the network service FMPA has requested is more costly than FMPA is willing to pay due to the fact that FMPA must also shoulder the cost of its own transmission investments, FMPA may file a new section 211 application and request in that application that certain of its loads and resources not be integrated by Florida Power (see Section E, infra). In the case of the Ft. Pierce and Vero Beach line, for example, FMPA could choose to continue to transmit power between the two cities instead of requesting integration service from Florida Power. FMPA could then request point-to-point service from Florida Power to transmit power to Ft. Pierce or Vero Beach from resources of another FMPA member or to transmit power from Ft. Pierce or Vero Beach to another FMPA member.[53]

C. FMPA Use of Network Service to Serve Florida Power's Partial Requirements Customers

1. Proposed and Final Orders

In the Proposed Order, the Commission found that section 211(c)(2) barred the Commission from ordering service for four IDO Project members that purchase power

[53] In reaching this decision, we are not in any way making a judgment on the merits of FMPA's pending antitrust action and whether, if Florida Power is found by a court to have engaged in past anticompetitive behavior, FMPA is entitled to compensation.

from Florida Power under partial requirements tariff and service agreements until those contractual obligations are terminated.[54]

In the Final Order, we clarified that we could order service, but that such an order could not become effective until termination or modification of the contracts.[55]

2. Rehearing/Clarification

On rehearing, FMPA requests clarification that the Commission, in the Final Order,[56] did not intend to bar network transmission service for the All-Requirements Project members of IDO, assuming that FMPA maintains the level of partial requirements purchases required by the contracts.[57] FMPA seeks assurance that it can use the network service to transmit the power that it will continue to purchase from Florida Power to its IDO Project members who are partial requirements customers of Florida Power.[58] According to FMPA, Florida Power has agreed to include all loads, including those served through requirements purchases from Florida Power, in the network transmission service arrangement.

3. Resolution

We will grant FMPA's clarification.

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[54] See 65 FERC at p. 61,615. Those four IDO member cities are Clewiston, Fort Pierce, Green Cove Springs and Jacksonville.
[55] See 67 FERC at p. 61,474 & n.5.
[56] See 67 FERC at p. 61,474 & n.5.
[57] Id. at pp. 16-17.
[58] FMPA request for rehearing at p. 16.

D. FMPA Operation in One Control Area

1. Final Order

The Commission stated that network service could be used to serve FMPA's load. However, the Commission also found that FMPA could not use network service to export power; that would require a separate charge. We also stated that Florida Power had "reasonably recognized that the FMPA loads in Florida Power Corporation's service area cannot be served directly from the [Florida Power] integrated grid and that some other arrangement" to serve those loads may be appropriate.[59]

2. Rehearing

FMPA states that it now operates in one control area using available point-to-point transmission from Florida Power. FMPA's control area includes its own generation and loads in the Florida Power and Florida Power Corporation service areas, FMPA's use of power supply resources and purchased power from units operated or dispatched by the Orlando Utilities Commission, and power purchases from Florida Power, Florida Power Corporation, Tampa Electric Company and the City of Gainesville, among others. FMPA also notes that it is a member of the Florida Municipal Power Pool, under which FMPA, the Orlando Utilities Commission and the City of Lakeland dispatch generation on a combined basis.[60]

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[59] 67 FERC at p. 61,483.
[60] FMPA rehearing at p. 17.

FMPA asks the Commission to clarify that it may continue to operate within a single control area, subject to the parameters of network transmission service, and to continue to operate in a power pool.[61] FMPA states that it has operated within a single control area when taking point-to-point transmission service, and that it should be able to continue to do so when taking network service. It acknowledges that it will have to pay an additional charge to export power to its members that are located outside of Florida Power's service area. FMPA states that it believes the Commission intended to allow such continued service, as that would further the Commission's comparability goal and would generally promote electricity coordination, efficiency, and savings.

Florida Power notes that the resources included in FMPA's control area that are made available to FMPA under the Florida Municipal Power Pool include resources that FMPA has not designated as network resources. Florida Power argues that FMPA cannot, under the guise of operating a control area or participating in a power pool, expand its network resources beyond those designated in the NIS.[62] Florida Power states that the issue is not whether FMPA can operate a control area or participate in a power pool, but rather whether some resources will be available only as purchases from non-network resources. Florida Power argues that it would be inappropriate to allow FMPA to designate all control area or power pool resources as network resources at this stage of the proceeding, because

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[61] FMPA request for rehearing at pp. 17-22.

[62] Florida Power's June 27, 1994 response at pp. 11-16.

FMPA failed to identify those resources as network resources before this pleading was filed, and because it would increase FMPA's network resources to a level that bears no relationship to its loads.

3. Compliance

In its protest to the compliance filing, FMPA complains that Florida Power's compliance filing improperly requires FMPA to operate a separate control area for the Member Cities and improperly requires scheduling of power to and from members of FMPA's control area that are located outside of Florida Power's service territory. FMPA states that the NIS should be modified to recognize that a third-party utility or an IDO Project member that is not a Member City may be in the same control area as FMPA's Member Cities, making scheduling between control areas unnecessary; otherwise, substantial savings could be lost.[63] FMPA also requests changes to the Network Operating Parameters (Operating Parameters) (formerly called Network Operating Agreement), to acknowledge the fact that the FMPA Control Area may be incorporated in a third party's control area.[64]

4. Resolution

FMPA clarifies[65] that it also views transactions involving resources not designated in the NIS (for example,

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[63] FMPA Protest at p. 41. For example, if FMPA has to create new control areas, it will need to have more total generation on line to balance generation and loads separately in both East and West Florida; also, it will have additional dispatch, computer and control costs. Id. at p. 37.

[64] FMPA Protest Appendix A at p. 5.

[65] FMPA Conditional Response of July 1, 1994 at pp. 12-14.

Florida Municipal Power Pool purchases) as nonfirm economy purchases. Thus, the parties are in agreement that FMPA can operate one control area and participate in a power pool, but that transactions involving resources not designated in the NIS will be nonfirm, economy transactions. We therefore find that Florida Power's proposed definition of FMPA's control area is not essential to implementation of the network transmission agreement. Accordingly, we will order Florida Power to revise proposed NIS sections 4.1.3, 4.1.3.1, 4.1.4, and 5.2.1, and Operating Parameters sections 2.1 and 2.2 to reflect FMPA's proposed modifications in this regard.

However, we will permit Florida Power's proposed scheduling provisions in sections 4.1.3 and 4.1.4 of the NIS to stand. Florida Power needs to schedule energy transfers between its service area and the service areas of other utilities. Moreover, FMPA's control area arrangement is presently being accommodated as a scheduled service, and we find that Florida Power can provide network transmission service without changing that arrangement.

E. Load Served by Local Generation

1. Final Order

In the Final Order, the Commission stated that FMPA should pay for network transmission service based on its contribution to the system loads to be served by the integrated transmission network (that is, its load ratio share).[66] We stated:

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[66] 67 FERC at p. 61,481.

If FMPA has a load and resource that it does not want to integrate, it can isolate the load and resource from [Florida Power's] transmission system and eliminate it from the request for full integration.[67]

2. Rehearing

On rehearing, FMPA states that it interprets the above statement "to mean that it can choose to serve an amount of load in a city from generation located in the city, so long as FMPA does not sometimes serve that level of load from external generation or use that generation to serve member loads outside the city."[68] FMPA asks the Commission to clarify that the Commission did not intend to require that FMPA create physical, electrical isolation from the grid. FMPA also requests that the Commission clarify that a load and resource would remain isolated even if the resource were used to provide power to someone else who needs it for emergency or maintenance purposes. FMPA seeks assurance that, if it excludes loads and resources from network integration service, it can obtain point-to-point transmission service to transmit power to those loads or from those resources.

Florida Power argues that FMPA wants to treat certain generating units as "isolated" for purposes of load ratio payment responsibility (even though the load and generation are not electrically isolated from Florida Power's grid), but make power available from these resources for maintenance and emergency services so that FMPA can

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[67] 67 FERC at p. 61,482 & n.77.
[68] FMPA rehearing at pp. 22-23.

consider the isolated resources as reserves for the network loads.[69] Florida Power contends that FMPA cannot count any generation as reserves for the IDO Project if such generation is actually isolated from Florida Power's system. Florida Power argues that FMPA's proposal should not be permitted under the network service agreement, which does not allow for the exclusion of particular loads and resources from network integration service at certain times.

3. Resolution

We will grant FMPA's requested clarification in part. We did not intend to imply that FMPA must create physical, electrical isolation in order to isolate a load and resource from the grid. If Florida Power or someone else needs emergency or maintenance power, FMPA may buy against or sell from the isolated units, assuming there is available transmission capacity at that time. Also, the fact that FMPA needs network integration service for some loads and resources does not prevent it from requesting point-to-point transmission for other loads and resources.[70] These are simply different services, subject to different charges.

Moreover, FMPA's reliance on non-network resources to meet it reserve obligations must take into account the fact that it has not contracted for network service to reach these isolated resources and must, therefore, rely on the availability of point-to-point service. This is true whether

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[69] Florida Power June 27, 1994 response at pp. 16-17.

[70] Of course, FMPA will bear the risk that point-to-point transmission may not be available when requested.

the non-network resource is an "isolated" FMPA resource or a purchase from a third party.

F. Sales of Power Directly From Florida Power to FMPA

1. Rehearing

On rehearing, FMPA states that there is a dispute concerning whether Florida Power must transmit power directly to FMPA, not just to FMPA's members.[71] FMPA requests that the Commission resolve: (1) whether FMPA can buy wholesale power in its own name for sale and delivery to the cities, as opposed to being limited to buying wholesale power as "agent" for its member cities; and (2) whether FMPA can have wholesale power transmitted on a network basis to various member cities as opposed to being restricted to delivery of fixed quantities to specified individual delivery points.[72] According to FMPA, Florida Power wants to restrict delivery points so that FMPA cannot blend purchased power to serve multiple customers.

2. Compliance/Resolution

On compliance, Florida Power has revised the contract to clarify that its sale of partial requirements power will be treated as network resources and that it will not limit network service on the ground that FMPA (rather than its

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[71] FMPA request for rehearing at pp. 24-32.
[72] Id. at p. 24.

members) is the purchaser.[73] This resolves FMPA's concerns.

G. Transmission Used to Export Power

1. Final Order

In the Final Order, the Commission determined that paying for network service used to meet its load does not entitle FMPA to use Florida Power's transmission to export power at no additional charge to FMPA.[74] We explained that FMPA will share proportionately in the costs of the transmission system. Whenever the transmission system is used for another purpose (that is, off-systems sales), the revenue from such sales should be shared by Florida Power and FMPA for the benefit of their native loads on the same basis as that on which the costs were shared. To ensure that the revenue credits generated by FMPA's and Florida Power's off-system sales are the same, the Commission ordered Florida Power to adopt its own regular transmission tariff rate as the basis for computing the transmission revenues for its off-system sales.[75]

2. Rehearing

FMPA requests rehearing, asserting that "If FMPA bears responsibility for total transmission costs proportionate to its load, it should have full transmission use, equal to that

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[73] The provisions include: sections 1.5, 15.1, and 15.2 of the NIS; and sections 1.6, 1.7, and 3.1 of the Operating Agreement.
[74] 67 FERC at p. 61,483.
[75] Id.

of [Florida Power]."[76] FMPA argues that Florida Power has unrestricted use of the transmission system to make sales to third parties.[77] Specifically, FMPA complains that Florida Power has more flexibility because Florida Power can use a combination of resources, while FMPA must either designate a single point-to-point transmission point, or pay additional point-to-point charges. If FMPA must pay Florida Power additional amounts for transmission to sell power to non-IDO members, then Florida Power logically should pay FMPA for its use of FMPA's transmission when Florida Power makes sales other than to its retail or firm wholesale customers.[78] FMPA also points out that there are a number of transactions that Florida Power undertakes that do not, in fact, generate a revenue credit to transmission users (for example, economy sales under the Florida Coordinating Group brokering system).[79] FMPA should be able to use the transmission system for similar transactions without having to pay transmission charges beyond the network rate.[80]

3. Compliance

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[76] FMPA rehearing at p. 33.

[77] According to FMPA, the fact that Florida Power records revenue credits is a ratemaking adjustment to prevent Florida Power from obtaining excessive profits; it is not a limitation on Florida Power's transmission use. FMPA rehearing at p. 33.

[78] Id. at pp. 35-36.

[79] FMPA rehearing at p. 37.

[80] FMPA also complains that the revenue credits related to Florida Power's use of the transmission system to make off-system sales should be flowed through as received and not reflected in the next rate case. Florida Power counters that all revenue credits are captured in the formula. This issue is being addressed in the Rate Case.

On compliance, Florida Power adds the following language to Section 8.2 of the NIS: "For any category of sales transactions for which [Florida Power] is required to credit revenues back to [Florida Power's] transmission customers (including FMPA), [Florida Power] shall apply the rate under the applicable Florida Power Transmission Tariff."

FMPA protests that Florida Power's compliance filing still fails to provide for comparable transmission revenue credits for both Florida Power and FMPA. FMPA also opposes the requirement in Section 8.2 of the NIS that FMPA use the Florida Power Transmission Tariff (thus requiring FMPA to designate a separate point-to-point path for each resource used) when making off-system sales using the Florida Power transmission system. Since FMPA and Florida Power may compete to sell power to others, FMPA argues that it needs equal access at equal rates, not at point-to-point rates; otherwise, Florida Power will have a competitive advantage over FMPA in many situations -- for example, where Florida Power and FMPA are competing to sell power to the same customer from multiple resources.

FMPA notes that, when Florida Power provides itself with point-to-point service (for example, for an off-system sale), Florida Power does not make separate point-to-point reservations to the extent it uses more than one generating unit to produce the power delivered off-system. FMPA states that it should not be required to make separate point-to-point reservations (and pay multiple charges) should it desire to change firm points of receipt for firm transmission services, as long as all of those points are located on the Florida Power transmission system.

4. Resolution

We agree with FMPA. When Florida Power makes an off-system sale, it does not designate a particular generating unit as the only point of receipt. Rather, Florida Power makes a system sale, relying on all of its integrated resources to support the transaction. This simply reflects the fact that Florida Power has designed (and incurred the cost for) a transmission network for the purpose of integrating all generating resources into a single system. Similarly, because FMPA is now a network customer, the transmission network will integrate all of FMPA's designated network resources and FMPA will pay a pro rata share of all network integration costs. As a network customer, FMPA should be treated comparably when it makes an off-system sale. Just as Florida Power uses its integrated resources to make system sales to third parties (without designating a specific generating resource as the point-of-receipt), FMPA should be allowed to make system sales from its designated network resources which are also integrated by Florida Power's network.

Therefore, we will order Florida Power to modify sections 8.1 and 8.2 of the NIS to reflect FMPA's proposed changes[81] and the fact that there will be revenue credits associated with all off-system sales, including Florida Energy Broker transactions.

H. Use of "Unused" Transmission Capacity to Reassign Power to Others

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[81] See FMPA Protest, Appendix A at pp. 45-46.

1. Final Order

In the Final Order, we found that network transmission service cannot be reassigned. We explained: FMPA henceforth will have the same rights and priority to use the grid in serving its "native load" that Florida Power has in serving its "native load," and will share the costs and benefits on the basis of load. It cannot reassign that status to another transmission user. Transmission customers who seek a different arrangement, e.g., point-to-point service through Florida Power's grid, are required to contract separately for their services, and the revenue realized from these other transactions will be shared by Florida Power and FMPA in proportion to their loads.[82]

2. Rehearing

FMPA argues that at times it will not be using the transmission system in amounts equal to its cost responsibility; furthermore, at times the system will have excess capacity.[83] FMPA claims that because the Commission has ordered it to pay for network transmission based on load, it may pay for more transmission than it needs. In light of this, if Florida Power can sell excess transmission capacity, FMPA should be able to do so as well. FMPA believes it should be able to use the transmission system up to the level of its load ratio at all times and, if it is not using the full amount, it should be able to use the transmission system for other purposes, including reassigning to third parties. FMPA repeats its earlier arguments that the

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[82] 67 FERC at p. 61,483.
[83] FMPA rehearing at pp. 37-38.

resale restriction is illegal under antitrust law and under Commission precedent.[84]

Florida Power counters[85] that under the proposed NIS, FMPA would be purchasing a service (network transmission), not an entitlement to the Florida Power transmission system. The network transmission service will enable FMPA to integrate the loads and resources of the IDO members. Florida Power also notes that whenever it uses its own transmission system for a non-network purpose (off-system sales), the Commission has ordered it to adopt its own point-to-point tariff rate for computing the transmission revenues from such sales.[86] The Commission should maintain its requirement that FMPA do the same; otherwise, Florida Power's other customers would subsidize FMPA's off-system sales.

3. Resolution

We decline to modify the Final Order on this issue. FMPA raises no new arguments to persuade us to do so. We are satisfied that, with the Commission-directed modifications in place, FMPA's off-system transactions will be treated in exactly the same way as Florida Power's own off-system transactions. FMPA will be subject to Florida Power's point-to-point transmission tariff's rates, terms and conditions, exactly as Florida Power itself will be subject to those same rates, terms and conditions for its own off-system sales.

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[84] Id. at pp. 39-41.
[85] Florida Power June 27, 1994 response at pp. 17-19.
[86] Id. at p. 18, citing 67 FERC at p. 61,483.

FMPA's argument that Florida Power's restriction on reassignment is anticompetitive is misplaced. As we explained in the Final Order, Florida Power's restriction on reassignment ensures that its native load customers do not subsidize FMPA, and vice versa. Under our load ratio approach to cost allocation, FMPA shares proportionately in the costs of the transmission system to enable it to take network transmission service. In the case of off-system sales to third parties, it is only fair to apply the same rules to FMPA as to Florida Power. When Florida Power makes an off-system sale, it must charge itself and credit the revenue back to its transmission system. This restriction ensures that FMPA receives only that service that it has requested and is paying for, resulting in the two parties sharing the revenues for the benefit of their native loads on the same basis that they share costs.[87]

I. Effect as Precedent

1. Final Order

In the Final Order, the Commission stated: Our rulings in this order are limited to the issues and facts of this case as presented by the parties. We may reach different conclusions in other cases based on different proposals by the parties, different facts, or the outcome of our pending inquiry on transmission pricing.[88]

2. Rehearing

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[87] See 67 FERC at p. 61,483.
[88] 67 FERC at p. 61,481 n.74.

Duke states that it interprets the Final Order as adopting a particular method of pricing based on the specific facts of the case. Accordingly, Duke states that the order should not prevent others from arguing for different pricing methods in other cases.[89] The Commission should also clarify that the decision not to set this case for an evidentiary hearing before an administrative law judge was based on the specific facts of this case and that parties in other cases are free to argue that such hearings are necessary.[90]

3. Resolution

We believe that our statement in the Final Order was unambiguous. The decisions to adopt a load ratio share pricing method and not to hold an evidentiary hearing in this case were based on the particular facts and circumstances presented. We note that the Transmission Pricing Policy Statement announced that the Commission's new policy is to allow greater flexibility in pricing of transmission services provided by public utilities and transmitting utilities. The Commission cautioned, however, that any new transmission pricing proposal must meet the Commission's AEP comparability standard; also, comparability of service applies to price as well as to terms and conditions.[91]

J. Effect of Pre-Existing Agreements -- Section 211(c)(2)

1. Proposed and Final Orders

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[89] Duke rehearing at pp. 4-7.
[90] Duke rehearing at pp. 7-10.
[91] Open Access NOPR, IV FERC Stats. and Regs. P 32,514 at pp. 33,068-69 (1995), citing Transmission Pricing Policy Statement at p. 31,136.

Section 211(c)(2) of the FPA provides that the Commission cannot issue an order requiring transmission services under section 211: which requires the transmitting utility subject to the order to transmit, during any period, an amount of electric energy which replaces any amount of electric energy -- (A) required to be provided to such applicant pursuant to a contract during such period, or (B) currently provided to the applicant by the utility subject to the order pursuant to a rate schedule on file during such period with the Commission . . . .[92]

In the Proposed Order, we found that FMPA's existing transmission contracts with Florida Power do not bar the Commission from ordering transmission services under section 211.[93] We pointed out that section 211(c)(2) refers to contracts to provide "electric energy" -- that is, to provide generation -not contracts to provide transmission. The Commission stated:

We believe that the choice of the term "electric energy" describes a broader concept -- that of electric service, reflecting the fact that electric energy is the term generally used to describe the "commodity" that is physically delivered over the transmission system.[94]

The Commission adopted this finding on a final basis in the Final Order.[95]

2. Rehearing

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[92] 16 U.S.C. § 824j(c)(2) (1994).
[93] 65 FERC at p. 61,614.
[94] 65 FERC at p. 61,615.
[95] 67 FERC at p. 61,476.

On rehearing, Texas Utilities alleges that the Commission should have found that section 211(c)(2) does bar the Commission from ordering transmission service that would replace transmission service under existing transmission agreements. Texas Utilities is concerned that the Commission's finding: invites transmission users to ignore freely negotiated transmission contracts (provided the electric energy being transmitted under such contracts is not also being purchased from the transmitting utility) in the hope of obtaining a transmission order from the Commission providing maximum service flexibility on terms and conditions and at a cost apparently equal to that of the transmitting utility's native load customers.[96]

In support, Texas Utilities argues that the definition of contracts to "provide electric energy" includes contracts to transmit electric energy. It notes that, in the Proposed Order, the Commission stated that "electric energy" is a broad term that describes the commodity to be delivered, not its origin or mode of delivery.[97]

According to Texas Utilities, the Commission's interpretation of section 211(c)(2) undermines the stability of transmission contracts and is contrary to the fundamental purpose of sections 211 and 212, which is to encourage

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[96] Texas Utilities rehearing at pp. 5-6.

[97] Texas Utilities rehearing at p. 4, citing Proposed Order, 65 FERC at p. 61,615. Texas Utilities also argues that the legislative history contradicts the Commission's interpretation. It quotes Senator Wallop as stating that the Commission cannot order transmission that would "lead the utility to terminate or cut back on ongoing or contracted for transmission." 138 Cong. Rec. S.17617 (daily ed. Oct. 8, 1992) (Statement of Sen. Wallop).

voluntary transmission. Texas Utilities requests clarification that a transmission customer cannot unilaterally abrogate an existing transmission agreement by filing a section 211 request for transmission.[98] According to Texas Utilities:

> Absent any agreement by the parties to modify an existing transmission arrangement, the Commission should not issue an [sic] transmission order that replaces any amount of electric energy (whether generated by the transmitting utility or transmitted from a third party) required to [be] provided under an existing contract.[99]

Texas Utilities also requests clarification that, in accordance with note 74 of the Final Order, the Commission's approval of a load ratio share approach to transmission pricing in this proceeding "does not constitute precedent with respect to pricing in any other proceeding under Sections 211 and 212 of the FPA."[100]

3. Resolution

As we stated in the Proposed Order, we continue to believe that the term "electric energy" is best understood as "the term generally used to describe the 'commodity' that is physically delivered over the transmission system."[101] Thus, we disagree with Texas Utilities' argument that Congress intended the term "electric energy" to encompass the transmission of electric energy. Nowhere in the FPA is the term "electric energy" used as a substitute for "transmission"

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[98] Texas Utilities rehearing at p. 6.
[99] Texas Utilities rehearing at p. 6.
[100] Texas Utilities rehearing at p. 7.
[101] 65 FERC at p. 61,615.

or the "transmission of electric energy." Senator Wallop's statement (or any other individual legislator's statement) is not dispositive.[102] Accordingly, we will deny Texas Utilities' request for rehearing on this issue.[103]

We will also deny Texas Utilities' request for clarification that the load ratio share approach in this proceeding will not constitute precedent concerning pricing in other transmission cases. We may refer to this proceeding and apply the load ratio share approach in future cases when it is appropriate to do so. If Texas Utilities intended to verify that we will not automatically apply the load ratio share approach in future cases, note 74 of the Final Order clearly says so.

K. Ancillary Services

FMPA had originally requested that the Commission provide a procedure for evaluating whether Florida Power must resolve this issue in this docket, or whether FMPA must file a separate complaint.

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[102] See, e.g., Blitz v. Donovan, 740 F.2d 1241 (D.C. Cir. 1984) ("Legislators' remarks during a floor debate . . . do not control statutory interpretation and generally are not accorded significant weight." Id. at p. 1247, citing Weinberger v. Rossi, 456 U.S. 25, 35 n.15 (1982); In re: Surface Mining Regulation Litigation, 627 F.2d 1346, 1362 (D.C. Cir. 1980); 2A Sutherland Statutory Construction § 48.13 (C. Sands 4th ed. 1973).

[103] However, an order directing transmission service under section 211 would not abrogate any existing transmission agreements. Thus, any charges under such an agreement that are not based on usage would continue to be payable even if no transmission service was scheduled under such an agreement.

The Final Order notes FMPA's concern that, to the extent ancillary services are not considered to be a part of the transmission function, and thus are not included in the charge for network service, Florida Power may not make ancillary services available on a nondiscriminatory basis. The Commission, relying upon the Principles submitted as part of the Brief of Florida Power,[104] stated:

> It appears that the various types of ancillary services will be available on a nondiscriminatory basis. Florida Power has committed itself to provide, as part of the network service, operating reserves and regulation service and to maintain voltage levels. FMPA will not need back-up transmission service, since it will have full use of the transmission network.[105]

On rehearing, Florida Power states that it is willing to sell ancillary services to FMPA,[106] but that the Commission should clarify that implementation of FMPA's planned integration will involve two separate utilities, each fully responsible for operating its own control area and providing (or obtaining from others) all necessary services, including ancillary services, for its respective control area. Florida Power states that, if the Commission did intend to require Florida Power to provide ancillary services in FMPA's

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[104] 67 FERC at p. 61,485 & n.92, citing Brief of Florida Power, Principles (Attachment 1) at p. 16

[105] 67 FERC at p. 61,485 (footnote omitted).

[106] Florida Power rehearing at p. 21. Florida Power states that, to date, FMPA has not requested such services from Florida Power. Id. at n.32.

control area as part of its network transmission service, then Florida Power seeks rehearing on that point.[107]

FMPA states that it will provide its own losses rather than purchase losses from Florida Power. FMPA does not challenge Florida Power's other ancillary services provisions.

We will grant Florida Power's request for clarification on this issue. In the Final Order, we intended for each utility to be fully responsible for operating its own control area and providing (or obtaining) all necessary services, including ancillary services, for its respective control area. Thus, we are not at this time ordering Florida Power to provide ancillary services within FMPA's control area, as part of its network transmission service. However, we remind the parties that, in this and all section 211 cases, we retain the authority to order ancillary services at any time as part of our continuing authority to order transmission service. Finally, we note that rate issues are being addressed in the Rate Case; the parties can address details concerning ancillary services in that proceeding.

We reiterate that our rulings here are limited to the issues and facts presented by the parties; we may reach different results in other cases.[108]

L. Access to Interconnections for New Generating Resources

The Final Order did not follow Florida Power's suggestion that FMPA's use of each interface be limited to

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[107] Florida Power rehearing at p. 5 & n.4.
[108] See 67 FERC at p. 61,481 & n.74.

FMPA's load ratio share.[109] The Commission found that, as FMPA argued, there is no reason to treat use of the interfaces any differently than any other facilities that comprise the grid and that to do so would produce an unreasonable result.[110] The Commission stated:

We conclude that FMPA should be allowed to use interface capacity for new generating resources on an equal basis with Florida Power -- that is, up to its share of the load, 3%. The rationale for using the load ratio share as a basis for cost allocation applies here as well. The costs of the grid should be allocated on the bases of the loads served on the grid, not on the basis of [Florida Power's] and FMPA's use from time to time, let alone on the basis of the relative use of discrete facilities that make up the grid. Indeed, there are no restrictions on the use of other parts of the transmission system. If the interfaces are constrained, Florida Power and FMPA should simply redispatch and share the redispatch costs and, ultimately, Florida Power will build new facilities when needed. The interfaces are just another part of the transmission grid, and Florida Power must plan and operate the grid, including the interfaces, to meet the combined needs of Florida Power and FMPA on an equal basis. When there are conflicting needs to use the same interface capacity, the

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[109] For example, based on a FMPA load ratio share of three percent and assuming 10 interfaces between Florida Power and other utilities with a capacity of 100 MW each, Florida Power would allow FMPA to use three MW at each interface. Florida Power had proposed that any FMPA use of an interface above this amount would require the payment of an additional charge under Florida Power's point-to-point transmission tariff

[110] Given the example in n. 105, supra., if FMPA needed to import 30 MW, it would have to arrange ten 3 MW sales from ten different parties.

parties have already agreed that the combined Florida Power and FMPA systems will be redispatched and the costs shared. When the grid, including interfaces, needs to be expanded, Florida Power will undertake the expansion on behalf of the combined system.[111]

The phrase, "that is, up to [FMPA's] share of the load, 3%" has apparently caused some confusion. Florida Power's compliance filing contains the very limitation that we rejected in the Final Order. FMPA complains that such restrictions on its use of the interface will have a severe impact upon FMPA because of its small load ratio share: FMPA would have to pay an additional charge to use the interface for virtually every transaction, even when Florida Power also is not currently using the interface.

We clarify that the phrase "that is, up to its share of the load, 3%" was not intended to limit FMPA's use of each interface to a discrete ratio (3%). Rather, FMPA, as well as Florida Power, can use each interface, if capacity is available, to serve its entire network load. If the interface is contained, they will either pay redispatch costs or expansion costs based on their load ratio share. Finally, both FMPA and Florida Power will have to pay an additional point-to-point charge when it uses the interface for a purpose other than transmitting the network load. We will direct Florida Power to revise its compliance filing accordingly.

The Commission also approved the parties' agreement that existing use of the interfaces would be grandfathered, that is, left undisturbed by the network service. In the Final

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[111] 67 FERC at p. 61,484.

Order, in response to FMPA's concerns, the Commission directed Florida Power to revise the grandfathering criteria to make the criteria applicable to FMPA the same as those applicable to Florida Power.[112]

On rehearing, citing sections 7.5 and 7.6 of the proposed NIS, Florida Power contends that it has offered to grandfather an amount of service at the interfaces, not specific resources[113]. Florida Power requests that the Commission clarify that no revision is necessary.

FMPA complains that, in defiance of the Final Order, Florida Power's compliance filing treats each interface separately (on a non-integrated basis) from other Florida Power transmission facilities.[114] FMPA complains that Florida Power's proposed limitations on FMPA's use of the interconnection facilities are an attempt to apply point-to-point transmission concepts to the transmission ties.[115] FMPA requests that the Commission order that:

> access to [Florida Power's] interconnections be available on the same terms as access to any other portion of the integrated network, treating interconnection facilities like any other transmission. FMPA would pay for a load ratio use of the network and would

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[112] 67 FERC at p. 61,484.

[113] Florida Power rehearing at pp. 19-20.

[114] FMPA protest on compliance at pp. 25-26. FMPA refers to Florida Power's NIS sections 7.3, 7.5, 7.7, and 7.11.

[115] FMPA protest at p. 32.

obtain equal use of the combined interfaces to serve its loads.[116]

We are satisfied with Florida Power's assurance that it considers our ruling in the Final Order to be applicable to arrangements that have not yet commenced. Thus, FMPA's concern about the provisions' applicability to its recent transaction with the City of Gainesville is resolved. Also, we are satisfied with Florida Power's explanation that sections 7.5 and 7.6 of the proposed NIS reflect Florida Power's offer to grandfather certain amounts of service at the interfaces, not just at specific resources. We expect Florida Power to do so. Therefore, we will not order Florida Power to make revisions in this regard.

M. Issues Raised on Compliance Only

FMPA raises numerous other issues in its protest to Florida Power's compliance filing. Our treatment of these issues in this order is limited in two ways. First, it is well-settled that the scope of a compliance filing is necessarily limited: it must contain only those changes directed or otherwise authorized by the Commission.[117] Second, many of the issues pertain to the parties' history, and do not warrant the Commission's detailed attention. Accordingly, we address in this order only those issues that bear directly on the implementation of network service under the FPA. To the extent that we do not expressly resolve an issue here that

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[116] FMPA protest at p. 32.

[117] See, e.g., Indiana & Michigan Municipal Distributors Association, et al. v. Indiana Michigan Power Company, 61 FERC P61,351 at p. 62,373 & n.14 (1992).

later proves to be problematic, at that time FMPA or Florida Power may bring the matter to the Commission's attention via a filing under section 211 of the FPA.

1. Substitute Resources

In the Final Order, the Commission stated, "Florida Power must allow substitution whenever it can be reliably accommodated because this is the same standard that Florida Power would apply to its own resource substitution."[118]

FMPA contends that the compliance filing fails to grant FMPA the same flexibility to use substitute resources as Florida Power. It interprets the Commission ruling as requiring "that FMPA, like [Florida Power], should have the ability to use a substitute resource for economy, emergency, maintenance, or any other reason so long as such replacement resource can be reliably accommodated by the transmission network."[119] FMPA complains that Florida Power does use economy, energy, and maintenance purchases from third parties to substitute for its own resources for any reason (including economy reasons). However, § 7.11 of Florida Power's proposed NIS only permits FMPA to use a substitute (alternate) resource to replace a Network Resource when the Network Resource is temporarily unavailable or derated. Also, if the Network Resource is directly interconnected with Florida Power, and does not use a Florida Power interface, there are no provisions for a use of a substitute resource.[120]

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[118] 67 FERC at p. 61,484.
[119] FMPA protest at p. 34.
[120] Id.

Florida Power maintains that sections 7.9., 7.10 and 7.11 of the NIS already comply with the Final Order by providing for FMPA to designate substitute resources and have the power from those resources delivered across other Florida Power interfaces.[121] Florida Power suggests that FMPA might incur additional charges if FMPA uses any particular interface in excess of its load ratio share.

We will direct Florida Power to revise the NIS specifically to provide that the standard for FMPA to be able to substitute resources is exactly the same as that for which Florida Power can substitute resources -- that is, whenever such substitution can be reliably accommodated.

2. Limit on Reserve Margin

Originally, Florida Power had proposed (section 4.3 of the NIS) that FMPA be allowed to designate network resources equal to no more than 125 percent of FMPA's network load. FMPA objected, but Florida Power has kept the restriction in its compliance filing.

FMPA argues that in section 4.3 of the NIS, Florida Power improperly proposes to deny FMPA the right to designate new network resources above an installed reserve margin of 25 percent.[122] FMPA complains that its resources are already above this limit and that it will be unable to add any new network resources, regardless of how economic, fuel efficient or environmentally desirable such resources may be. FMPA maintains that one of the reasons it has large reserve

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[121] Florida Power compliance filing, transmittal letter at pp. 4-5.
[122] FMPA protest at p. 42.

margins is that its members were unable to obtain transmission service and were forced to build isolated units in their individual cities. FMPA adds that it expects the IDO Project to maintain a reserve margin higher than Florida Power's. FMPA states that, while that may increase FMPA's own costs, it benefits Florida Power and other utilities by adding to overall reserves in the Florida peninsula at no cost to Florida Power, providing direct benefits to Florida Power in the form of system stability and reactive power. FMPA adds that Florida Power's proposed limits on excess reserves is also at odds with its allegation in the Rate Case that Florida utilities are maintaining too few reserves, thereby leaning on Florida Power. FMPA contends that Florida Power's contrary position in this proceeding simply reflects an anticompetitive desire to restrict FMPA's use of the transmission or to assess higher charges for that service. FMPA argues that the level of its reserves does not affect the level or cost of network transmission service: to the extent that FMPA uses the extra resources to make off-system firm sales, FMPA will pay Florida Power an additional point-to-point transmission charges.[123]

Florida Power defends the 25 percent reserve margin as consistent with industry practice and, therefore, fair.

The Commission finds some merit to both parties' positions. Our task is to balance Florida Power's legitimate concern -- that it not be required to plan a transmission system to accommodate resources far in excess of the network load -- against FMPA's understandable desire to

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[123] Id. at p. 45.

maximize its flexibility to use all available generating resources to meet its load. We will balance these concerns by requiring Florida Power to eliminate the 25 percent limit and adopt a requirement that network resources be limited to resources owned by FMPA or purchased subject to an executed contract. This remedy is based upon the economic incentive that all utilities have to minimize their reserve margins, because reserves in excess of need add to the cost of providing service. FMPA is not immune from the cost burdens of excess reserves. Moreover, if FMPA has resources in excess of its needs on the Florida Power system, it will presumably market the excess using point-to-point transmission service, thereby increasing Florida Power's transmission revenues.

However, a complicating factor is that FMPA has resources on Florida Power Corporation's system that it could also designate as network resources under the Florida Power arrangement. Since these resources are primarily dedicated to meeting FMPA loads on Florida Power Corporation's system, there would be no cost consequences to FMPA if it designated these resources under Florida Power's network tariff. However, Florida Power would incur additional costs to stand ready to deliver power from FMPA resources located on Florida Power Corporation's system. Including those resources would have Florida Power incurring costs to integrate resources that bear no reasonable relationship to FMPA's network load. If the parties disagree as to the amount of resources (owned by FMPA or purchased subject to an executed contract) located on the Florida Power Corporation system that can be designated as network

resources, the parties can pursue arbitration procedures or seek Commission review.

3. Incremental Costs of Transmission Upgrades

Florida Power originally proposed that it and FMPA should separately bear the incremental costs of their respective new transmission facilities required because of the decisions each makes about where to locate new generation facilities. FMPA countered that the cost of incremental transmission upgrades should be rolled into transmission rate base. In the Final Order, the Commission deferred resolution of this pricing issue until Florida Power actually proposes a specific upgrade necessary to accommodate the transmission service requested in this docket, or to meet its own needs. The Commission stated, "At that time, Florida Power should file a petition for a rate order in a new subdocket in Docket No. TX93-4."[124]

FMPA argues that on compliance Florida Power has improperly made no provision for considering or implementing the direct assignment to Florida Power of incremental facility costs associated with Florida Power's needs, while including provisions designed to assign directly the incremental costs of upgrades associated with FMPA's needs to FMPA.[125] FMPA also complains that Florida Power appears to contemplate that this issue will be resolved in dispute resolution rather than in a filing before the Commission.

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[124] 67 FERC at p. 61,485.
[125] FMPA protest at p. 46.

Florida Power states that it intends to make a filing to implement any incremental cost pricing provisions.

We will order Florida Power to amend the proposed NIS to reflect its obligation, as stated in the Final Order,[126] to file with the Commission any incremental cost pricing proposal for transmission upgrades. As we stated in the Final Order, FMPA may challenge such a proposal before this Commission after it is filed.

4. Adding New Members to the IDO Project

In the Final Order, we stated that if FMPA wants to change "in any fashion" the service that it has requested in this proceeding, and if it wants the Commission to order the change, it must file a new request for transmission services in a new TX docket under sections 211 and 212.[127] Florida Power maintains that FMPA's addition or deletion of new IDO members would constitute such a change in service.

FMPA opposes Florida Power's proposed NIS § 5.2 requirements, specifically: (1) if FMPA desires to add new members to the IDO project or to delete current members, it must file for a change under sections 211 and 212 of the FPA; (2) there will be a five-year notice (or shorter notice upon mutual agreement) for new interconnection points; and (3) FMPA must pay the cost of facilities that the Commission permits to be directly assigned. FMPA states that it is unlikely that it will add anyone to the IDO project and that transmission constraints caused by doing so are even less

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[126] See 67 FERC at p. 61,486 & n.94.
[127] 67 FERC at p. 61,486.

likely. In that event, FMPA continues, Florida Power should simply commit to add members or interconnections immediately. In the unlikely event that some modification is necessary, they should be added as soon as the modification can be accomplished. According to FMPA, although the Final Order is not specific as to each of these points, the tenor of the Commission's order is that service terms should be reasonable. FMPA requests that the Commission keep this docket open to resolve potential difficulties between the parties; also, FMPA states that it could file a complaint under section 206 of the FPA if it is aggrieved.

Florida Power contends that the five-year notice provision is similar to the notice provision approved by the Commission for new resources. In the Final Order, we stated: Florida Power must revise the notice provision to allow FMPA to request a new resource on less than five years' notice. If FMPA makes such a request and Florida Power refuses, FMPA may file a compliant with the Commission. However, we also encourage the parties to adopt a dispute resolution procedure, such as arbitration, to deal with any problems of this nature that may arise.[128]

Finally, Florida Power emphasizes that any proposals for direct assignment of costs would require Commission approval.

The Commission is satisfied that Florida Power's explanations on this issue adequately address FMPA's concerns. We agree with Florida Power that FMPA's addition or deletion of new members warrants a new filing under

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[128] 67 FERC at p. 61,484.

sections 211 and 212. Therefore, we will accept the compliance filing without modification on this issue.

5. Terms and Termination Provisions

Florida Power proposes an initial term of 20 years,[129] with earlier termination as approved by the Commission. Florida Power also proposes that any new request for service under section 211 be treated as a notice of termination of the service agreement in this proceeding.[130]

FMPA objects to Florida Power's proposed initial term of 20 years, as well as the provisions allowing Florida Power to terminate the NIS under various circumstances. FMPA states that Florida Power should not be allowed to terminate service without a Commission order under section 211(d)(1) of the FPA or before the end of an initial term; the term should be settled. FMPA contends that the potential for early termination would create uncertainty and may undermine its ability to finance its network integration project. FMPA also objects to treating any new request for transmission service as a notice of termination of the instant agreement. Finally, FMPA argues that the initial term should be 30 years, the same maximum term Florida Power is proposing for service under its transmission tariff at issue in the Rate Case.

On compliance, Florida Power agrees to the 30-year term. Florida Power also notes that the option to petition for early termination of service is included in section 211.

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[129] NIS section 2.1.
[130] NIS sections 11.3, 17.2.

We agree with FMPA that there is no basis to treat any new request for transmission service under section 211 as automatically terminating the service ordered in this proceeding. If FMPA makes a new request for transmission service under section 211, that new proceeding will address the need to revise or terminate the NIS, if any. Finally, Florida Power is correct that the right to petition for early termination is granted in section 211; the right would exist whether or not we ordered it deleted from the agreement. We will not do so.

6. "Gold-Plated" Equipment and Data Requirements

FMPA argues that Florida Power proposes excessive "gold-plated" equipment and data requirements that would artificially inflate FMPA's costs.[131] FMPA also contends that Florida Power requires excessive data (e.g., data concerning non-integrated loads and resources), thereby imposing an unnecessary burden on FMPA. Finally, FMPA complains that the NIS requires FMPA to provide reactive power in undefined amounts and circumstances. Florida Power states that FMPA must be prepared to install equipment comparable to what Florida Power uses in operating its system. Florida Power adds that FMPA can pursue any specific concerns through the dispute resolution process.

We will direct Florida Power to eliminate requirements for "state-of-the-art" equipment. "State-of-the-art" is a non-technical term that is subject to numerous interpretations. We urge the parties to resolve this and the

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[131] For example, Florida Power requires state-of-the-art high accuracy metering equipment, rather than accurate metering equipment.

remaining disagreements over details in the dispute resolution process.

7. Reciprocity of Information and Participation in Transmission Planning

FMPA contends that Florida Power has failed to comply with the comparability standard's requirement of reciprocity for provision of information and participation in transmission planning, even though it will be responsible for the costs of some system studies. FMPA also complains that Florida Power is not required to provide FMPA with data concerning Florida Power's system. Florida Power answers that there is no reason to include FMPA in planning or studies except on a project-specific basis.

We agree that FMPA should be allowed to participate fully in studies that relate to its own service requests. However, we do not believe that FMPA has a role in Florida Power's day-to-day system planning. Florida Power's planning for increases in load growth is a part of the overall service, and FMPA does not need to be involved with Florida Power's planning when it involves Florida Power's own native load or its other third-party customers. Accordingly, we decline to order Florida Power to provide any further system data to FMPA.

8. Tariff Language Issues relating to Rate Case

Finally, FMPA suggests that the Rate Case be used to resolve tariff language issues subsidiary to those cost-of-service issues that the Commission already has stated will track the resolution of that proceeding (that is, cost-of-service

issues other than those specifically raised in briefs in this proceeding). We confirm that all remaining rate issues, both numerical issues such as cost-of-service, and language issues, will be resolved in the Rate Case.

9. Revenue Credits

In the Final Order, we stated, "To ensure that the revenue credits generated by Florida Power's off-system sales are the same as those generated by FMPA's off-system sales, Florida Power must adopt the tariff rate as the basis for computing the transmission revenues for its off-system sales."[132] FMPA complains that Florida Power has not provided for the credits. However, in Florida Power's compliance filing, Section 8.2 of the NIS contains language requiring it to use the tariff rate for revenue credits. FMPA's concern on this issue is therefore resolved.

10. Miscellaneous

FMPA contends that it should not have to surrender numerous legal rights as the price for obtaining network transmission service. In this regard, FMPA proposes extensive line-by-line revisions to Florida Power's proposed rate schedule. Many of FMPA's objections are more related to the tone than the content of the NIS or to the parties' historic relationship.[133] The Commission will not

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[132] 67 FERC at p. 61,483.

[133] For example, FMPA wants the Agreement to be revised to state that Florida Power has been ordered [rather than agreed] to provide FMPA with network service, so that there be no mistake that this was not a bargained-for contract with more flexibility for parties than a compliance with a Commission order would indicate. Along the same line, FMPA

specifically address those issues that are not essential to implementation of the transmission service.

Among those issues specifically concerning implementation, FMPA argues:

(a) Florida Power's proposed exculpatory provision (NIS § 12.1) should be deleted; it would indemnify Florida Power for any loss arising from or contributed to by this transmission service except where shown to have been caused by the negligence or willful misconduct of Florida Power. According to FMPA, Florida Power has no basis upon which to indemnify itself. FMPA argues that under Northeast Utilities Service Company,[134] the clause should be stricken. FMPA also complains that there is no comparable provision for FMPA to be indemnified; and there is an additional requirement for FMPA to indemnify Florida Power regardless of whether the action was related to the transaction, or any FMPA action.

We agree with FMPA that indemnification and liability provisions should apply equally to both parties. Section 15.0 of the Open Access NOPR's pro forma network transmission tariff contains such a provision. Accordingly, we will order Florida Power to modify Section 12.1 of the

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complains about a provision describing the NIS agreement as the parties' "complete agreement" regarding transmission service: the parties are hardly in complete agreement on anything. FMPA also complains that the "whereas" clauses improperly describe its original request because it does not mention sales to third parties (transactions that the Commission has ordered be accommodated under the point-to-point tariff).

[134] 62 FERC P61,294 (1992) (NU).

NIS to conform to Section 15.0 of the Open Access NOPR's pro forma network transmission tariff.

(b) FMPA should not be forced to arbitrate disputes concerning network transmission service (NIS section 16.1), because such provisions are appropriate only when the parties agree to such arbitration. We agree, and will order Florida Power to revise the NIS to permit binding arbitration only when all parties involved agree to submit to it.[135]

(c) Florida Power's provision (NIS section 11.3) that it may terminate the contract for non-payment violates the Final Order, which requires Commission approval for termination of service. We agree that this provision should be adopted. Florida Power's rates, terms and conditions for the service we have ordered under sections 211 and 212 must be on file under section 205.[136] Our regulations, 18 C.F.R. § 35.15 (1995), do not allow termination of service automatically for non-payment or because of billing disputes. Florida Power may pursue these billing matters by pursuing appropriate judicial action or by bringing such matters to the Commission in a timely filing.

(d) Florida Power improperly attempts to impose upon FMPA a 24-month deadline for challenging bills, arguing that it is unduly restrictive and contrary to Commission precedent. FMPA argues that a 24-month period

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[135] Nevertheless, we encourage the parties to strongly consider arbitration. The Commission's resources are taxed and we cannot serve as a forum for the resolution of all the parties' disputes, particularly if the parties, as is often the case, request immediate resolution of their disputes.

[136] See 67 FERC at pp. 61,485-86.

should apply only to those items concerning computational matters. We agree that, where formula rates are concerned, billing errors may not be readily discernible. We decline to change our policy of allowing refunds when formula rates have been incorrectly computed (or unreasonable costs have been passed through to the customer), regardless of the amount of time that has passed since the bill was paid.[137]

(e) The force majeure provision (NIS seetion 13.1) is unfair in that it would relieve Florida Power of liability for force majeure, but would force FMPA to pay any costs due under the agreement regardless of whether such costs would otherwise be excused under the force majeure provision. FMPA argues that, if force majeure events will excuse Florida Power from performance, they should also excuse FMPA from payment.

We will not order any changes to the force majeure provision. Even when Florida Power cannot provide service due to force majeure, it must still pay for its facilities, including its transmission system. Thus, it would not be just and reasonable to excuse FMPA from its payment responsibility in a force majeure situation.

(f) Contrary to Florida Power's proposed NIS section 18.5, all provisions of the compliance filing (including article and section headings) should be meaningful. We will not order a change to this section. It is standard in contract interpretation, and it is a standard provision in many contracts, that the contract text alone controls parties' rights

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[137] See Boston Edison Company, 61 FERC P61,026 (1992).

and obligations; section headings or titles only serve an organizational function.

(g) FMPA claims that a provision[138] allows Florida Power to include in bills unspecified costs found to be related to the service. We direct Florida Power to make a filing before imposing any charges that are not specified in the NIS or in the formula rate.

(h) FMPA claims that it is not clear in the NIS that, when Florida Power is exercising discretion (for example, determining available capacity), it is obliged to perform reasonably and in good faith. Florida Power counters that, if the law requires such standards, then FMPA will be able to pursue remedies if necessary. We will direct Florida Power to revise the NIS to explicitly recite that it will perform reasonably and in good faith.

(i) FMPA opposes a clause[139] that states that FMPA has not waived its rights under section 206 of the FPA because the clause does not reference sections 211 and 212. FMPA wants an explicit acknowledgement that it also has not waived any rights under sections 211 or 212. We will direct Florida Power to revise the NIS to reflect this.

(j) FMPA opposes a provision[140] that states that Florida Power will have no obligation to serve the electric requirements of FMPA's members or to provide them with any services beyond those specified (and any agreements

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[138] NIS section 6.2.
[139] NIS section 17.1.
[140] NIS section 18.16.

executed in the future) because it is at odds with Florida Power's obligations under the antitrust conditions of its nuclear license. We agree that the provision is unnecessary, and we will order Florida Power to eliminate it. Florida Power's obligations are set forth in the agreement, and it is not necessary to set forth what the agreement does not obligate the parties to do.

FMPA also objects to a provision[141] that states that the transmission service is subject to all existing or future applicable federal state and local laws and orders by jurisdictional authorities because this service is controlled exclusively by section 211. We find no reason to order deletion of this provision.

FMPA objects to a provision[142] that states that the agreement does not provide benefits to non-parties because it "defeats any rights of third party beneficiaries." We need not order deletion of this provision because clearly this agreement does not apply to non-parties.

(k) FMPA argues that the NIS overstates the contract demand for partial requirements service that FMPA will continue to purchase from Florida Power under existing agreements because it does not track the changes in contract demand reservations that have been provided to Florida Power in the past. Florida Power responds that this provision is consistent with the parties' existing contracts. Florida Power fails to address FMPA's concern that prior contract demand reservations have not been recognized. The

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[141] NIS section 18.11.
[142] NIS section 18.15.

Commission will direct Florida Power to revise the NIS to recognize explicitly that the contract demand provisions of the existing power sale agreements are unchanged by the transmission service, and that all prior contract demand reservations will be honored.

The Commission orders:

(A) Florida Power and FMPA's requests to file supplemental responses are granted in part, and denied in part, as discussed in the body of this order.

(B) The parties' requests for rehearing and clarification are hereby granted in part, and denied in part, as discussed in the body of this order.

(C) Florida Power is hereby directed to make a compliance filing consistent with this order within 30 days.

(D) Docket Nos. TX93-4-002 and EL93-51-002 are hereby terminated.

By the Commission.

67 FERC 61,167

FEDERAL ENERGY REGULATORY COMMISSION

Florida Municipal Power Agency v. Florida Power & Light Company, Docket Nos. TX93-4-000 and EL93-51-000

Final Order Under Sections 211 and 212 of the Federal Power Act Directing Network Transmission Service and Establishing Rates, Terms, and Conditions

(issued May 11, 1994)

Before Commissioners: Elizabeth Anne Moler, Chair; Vicky A. Bailey, James J. Hoecker, William L. Massey, and Donald F. Santa, Jr.

On January 31, 1994, Florida Municipal Power Agency (FMPA) and Florida Power & Light Company (Florida Power) filed briefs in support of their respective proposals for the rates and terms for network transmission service ordered by the Commission in its Proposed Order[1]. In this order, we direct Florida Power to provide network transmission service to FMPA, and adopt Florida Power's pricing proposal, with certain modifications.

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[1] Florida Municipal Power Agency v. Florida Power & Light Company, 65 FERC P61,125, reh'g dism'd, 65 FERC P61,372 (1993). The Proposed Order required FMPA and Florida Power to file briefs in support of their positions if they were unable to reach agreement by January 26, 1994. On January 21, 1994, FMPA and Florida Power jointly filed a request for an extension of time until January 31, 1994; that request was granted.

I. Background

A. The Proposed Order

The background of this case is described in detail in our Proposed Order granting FMPA's request for "network service"[2] pursuant to sections 211 and 212 of the Federal Power Act (FPA), as amended by the Energy Policy Act of 1992 (Energy Policy Act).[3] The network service, which in this case is full integration service, would support FMPA's Integrated Dispatch and Operations (IDO) Project.[4] The

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[2] The Commission explained that, although there is no industry-wide accepted definition of "network service," FMPA defined such service as "a transmission arrangement that would enable [FMPA] to distribute a given quantity of transmission network usage among various delivery points, without paying multiple monthly or yearly transmission charges." 65 FERC at 61,599 (citing FMPA Complaint at 25); see also id. n.3.

[3] 16 U.S.C.A. 824j-824k (West Supp. 1993). FMPA also filed a complaint in Docket No. EL93-51-000 alleging that certain terms and conditions of existing transmission service agreements (TSAs) under which Florida Power provides transmission services on behalf of FMPA's members are unjust, unreasonable and unduly discriminatory under section of 206 of the FPA. The Commission stated that, given that it would grant FMPA's request under section 211, we would establish further procedures to address the matters raised in FMPA's complaint only if they are not resolved by the Commission's action in Docket No. TX93-4-000. 65 FERC at 61,599 & n.4. FMPA argues (Brief at 115-116) that we should also order network service under section 206. It argues that this second legal basis will confirm the availability of network service even if Florida Power challenges the section 211 order. We see no need to proceed under section 206. Sections 211 and 212 provide ample authority for this order.

[4] FMPA wants to fully integrate all of its resources, i.e., to dispatch any resource to meet any load at any moment. The IDO project would involve FMPA's dispatching resources located within and without Florida Power's

Commission rejected, on a preliminary basis, multiple point-to-point charges for network service.

In our Proposed Order, we preliminarily concluded that Florida Power should provide network transmission service to FMPA. This was based on several preliminary findings, including findings that: (1) the existing TSAs do not pose a bar under section 211(c)(2);[5] (2) the network service would allow FMPA and its members to achieve greater efficiency and ratepayer savings and thus meets the public interest standard of section 211(a) of the FPA;[6] (3) the network service would not unreasonably impair the reliability of affected electric systems;[7] and (4) FMPA has substantially

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service area to meet FMPA members' loads located within Florida Power's service area. At a later date, FMPA may seek additional services to integrate its resources within Florida Power's service area with its loads located outside of Florida Power's service area. See note 82 infra.

[5] However, the Commission found that it was barred from ordering FMPA's requested service for four IDO Project members that purchase power from Florida Power under partial requirements tariff and service agreements, until such contractual obligations are terminated. Id. at 61,615. See id. at 61,614-15 for a detailed discussion of this issue. As discussed in Section II.B, infra, we clarify that while the Commission could issue such an order, the order could not become effective until termination or modification of the rate schedules for such service. See FPA section 211(c)(2)(B).

[6] Id.

[7] Id. at 61,616. The Commission added that it expected FMPA and Florida Power, in the course of their negotiations, "to propose conditions to ensure that there is no unreasonable impairment to the continued reliability of electric systems affected by a final order." Id.

met the requirements of a good faith response under section 213 of the FPA. As required by section 212 of the FPA, the Commission ordered Florida Power and FMPA to attempt to negotiate the rates and terms of the network transmission service.[8]

The Commission rejected Florida Power's argument that FMPA should have to commit itself to take any network service that is ultimately ordered. We stated that presumably FMPA has requested network service because it believes that such service would provide an economic basis for its IDO Project. However, we also noted that network service may prove to be less economic than the point-to-point service FMPA currently receives. Thus, the Commission clarified that "if FMPA decides -- once the rates, terms and conditions have been set in this proceeding -- that the cost of the service under a section 211 order would be so high as to render the IDO Project uneconomic, FMPA has the option to continue to take service from Florida Power under the existing [TSAs] until they are terminated."[9]

We also required FMPA and Florida Power to submit, within 15 days of the end of the 60-day negotiation period, all rates, terms and conditions that were agreed upon, accompanied by cost support and, with respect to any matters

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[8] In response to Florida Power's claim that it needed additional technical information in order to evaluate FMPA's request for transmission service, the Commission required FMPA to provide the information within 15 days of the date of the Proposed Order. Id. at 61,611 n.115, 61,617 n.150.

[9] Id. at 61,617 (footnote omitted); see also id. at 61,613.

still in dispute, briefs to support their final positions. The Commission required FMPA and Florida Power to provide sufficient information to enable us to establish final rates under section 212 or to establish interim rates pending a final decision. Other parties were not permitted to file briefs at this stage; rather, they may request rehearing of this order if they are aggrieved.

Finally, the Commission stated that pursuant to section 212(c)(1), the Proposed Order is not reviewable or enforceable in any court, and that the Proposed Order is an interlocutory order not subject to requests for rehearing.[10]

B. *Order Dismissing Requests for Rehearing and Motions for Evidentiary Hearing*

On November 29, 1993, Florida Power filed a motion for an evidentiary hearing or, alternatively, a request for partial rehearing of the Proposed Order. On November 29, 1993, Duke Power Company (Duke) filed a request for rehearing and for clarification. On November 29, 1993, Texas Utilities Electric Company (Texas Utilities) filed a request for rehearing and a motion for clarification as to the requirement for an evidentiary hearing.

All three parties argued that the Proposed Order circumvented the procedural requirements of sections 211 and 212 of the FPA and sections 554, 556 and 557 of the

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[10] Id. at 61,613, citing 18 C.F.R. 385.713 (1993). For a discussion of procedural requirements, see 65 FERC at 61,618 & n.156.

Administrative Procedure Act (APA).[11] More specifically, Florida Power argued that the Proposed Order did not recognize that a trial- type evidentiary hearing may be necessary if technical or factual issues remain in dispute at the end of the negotiation period. Duke and Texas Utilities argued that the Commission ignored the procedural requirements of sections 211 and 212 of the FPA by not establishing a trial-type, evidentiary hearing before issuing the Proposed Order. Duke and Texas Utilities also argued that they will not have an opportunity to participate in a meaningful way in this proceeding if they are not permitted to file briefs before the Commission's final order in this proceeding.

The Commission dismissed the requests for rehearing and the motions for evidentiary hearing without prejudice and clarified the Proposed Order. [12] The Commission explained that it had stated in the Proposed Order that that order was an interlocutory order not subject to requests for rehearing,[13] because "to entertain and respond to arguments regarding preliminary findings and a proposed order could result in a waste of resources of both the Commission and the parties, and could unnecessarily delay the provision of transmission services." [14]

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[11] 5 U.S.C. 554, 556, 557 (West Supp. 1993). See 65 FERC at 63,011.

[12] 65 FERC P61,372 (1993).

[13] 65 FERC at 61,612. The Commission noted that it had expressly explained in the Proposed Order that its findings and determinations were preliminary.

[14] Id. (emphasis in original). The Commission noted that such a procedure did not deprive parties of an opportunity to make their views known (that

In addition, the Commission rejected arguments that by not establishing a trial-type, evidentiary hearing, we violated the procedural requirements of sections 211 and 212 of the FPA. The Commission stated that section 211 requires only that the Commission provide "an opportunity for an evidentiary hearing."[15] Thus, the Commission explained, any determination in the Proposed Order as to whether to order an evidentiary hearing would have been premature, given that Florida Power and FMPA were provided a 60-day period during which they might reach a mutual resolution. Finally, the Commission clarified that once the Commission issues a final order in this proceeding, all aggrieved parties to this proceeding may seek rehearing and argue that an evidentiary hearing is necessary.

II. Discussion [16]

A. *Additional Pleadings*

On February 24, 1994, FMPA filed a motion for leave to file additional affidavits. It claims that these affidavits are

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is, their views beyond those already expressed in their pleadings filed prior to the issuance of the Proposed Order); "rather, it provides a more appropriate time for making those views known." Id.

[15] 65 FERC at 63,012 (emphasis in original).

[16] We note that FMPA and Florida Power have been able to agree on a number of issues. We approve these agreements (under section 212(c)(2)(A)) in principle for purposes of this case; however, we retain authority to ensure when the compliance filing is made that these principles are carried out in an acceptable manner.

needed to respond to arguments made in Florida Power's brief that FMPA could not have addressed in FMPA's brief.[17]

In response, Florida Power argues[18] that FMPA is simply trying to seize an opportunity to file a reply brief, when the Commission did not provide for reply briefs. It says that its brief did not raise any arguments to which FMPA had no chance to respond.

On March 15, 1994, Florida Power provided the Commission with a copy of a draft Network Operating Agreement (NOA) that it had sent to FMPA. The draft NOA contains technical and engineering provisions related to the coordination of FMPA's control area with Florida Power's transmission operations.

On March 21, 1994, FMPA made a filing[19] in which it responds to: (1) Florida Power's March 11 filing of two affidavits, and (2) Florida Power's March 15 submission of the NOA. It again argues that it is entitled to credits for its

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[17] The first affidavit ("Second Wilson Affidavit") is designed to identify alleged inconsistencies between Florida Power's position and the material on which Florida Power relies for support with regard to what FMPA characterizes as Florida Power's premise that FMPA's IDO members are part of FPL's transmission area. FMPA says that it could not have known that Florida Power would rely on those materials. The second affidavit ("Third Malmsjo Affidavit") addresses several matters related to Florida Power's analysis of its own use of its transmission system and of the savings created by the IDO Project. Again, FMPA says that it never had a chance to respond to these analyses.

[18] Power to FMPA's Motion for Leave to File n18 March 11, 1994 Response of Florida Additional Affidavits.

[19] n19 Response of FMPA to Florida Power's Filing of a Network Operating Agreement and of Affidavits.

transmission facilities. FMPA also objects to various aspects of the NOA.

Florida Power responds [20] by arguing that FMPA wants to use Florida Power transmission facilities to integrate all of its load while paying rates based on a fraction of its load. It also denies that it filed its NOA unilaterally; instead, it says, it sent a draft to FMPA to further negotiations, merely sending a courtesy copy to the Commission.

We will not accept any of these filings. The Proposed Order provided only for briefs to be filed, and the later filings are unnecessary.

On March 1, 1994, Direct Electric Inc. (Direct) filed a late Motion to Intervene. Direct states that it has a direct and substantial interest in this proceeding in that it is a consortium of power suppliers that expects to participate in the electric power market as a marketer of electric power.[21] It states that it is organizing an all-encompassing system (Regional Integrated Dispatch and Operations Project, or RIDO) that will enable it to offer its customers access to the nine North American Electric Reliability Council grids. Direct asserts that Florida Power's proposal would render its RIDO project uneconomic.

Florida Power opposes Direct's request for late intervention.[22] It argues that there is no good cause for late

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[20] Answer of Florida Power to FMPA's Unauthorized Response, filed March 25, 1994.

[21] Direct Motion to Intervene at 2.

[22] Answer of Florida Power in Opposition to Motion of Direct to Intervene Out of Time, filed March 16, 1994.

intervention simply because Direct chose to sit on its rights and await the outcome of the negotiations. Moreover, intervention at this stage will disrupt the procedures established by the Commission, according to Florida Power; even those who intervened in a timely manner have not been permitted to comment on Florida Power's and FMPA's briefs at this stage. Moreover, Direct's interests coincide with FMPA's, so its interests are adequately represented. Finally, Florida Power argues that Direct is raising matters that are beyond the scope of this proceeding in that transmission service for the "hypothetical" RIDO project is not at issue here.

In response, Direct requests permission to file an affidavit signed by Alan K. Richards, a vice president of Direct.[23] The affidavit argues that each of Florida Power's arguments against Direct's late intervention should be rejected.

Direct also filed[24] another motion to intervene in this proceeding. It again argues that it should be permitted to intervene at this stage.

Florida Power objects to Direct's motion for leave to file the affidavit.[25] It again argues that Direct's arguments are outside the scope of this case, that Direct will not be affected by this case, and that Direct has shown no good cause for its lateness.

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[23] Motion of Direct for Leave to File Affidavit, filed March 22, 1994.
[24] Motion to Intervene of Direct, filed March 25, 1994.
[25] Answer of Florida Power in Opposition to Motion of Direct for Leave to File Affidavit, filed March 29, 1994.

We will allow the late intervention, but Direct must take the record as it finds it; we will not consider Direct's substantive arguments at this stage of the proceeding. The Proposed Order made it clear that only FMPA and Florida Power may file briefs at this stage. Direct, like the other intervenors, may raise arguments on rehearing of this order if it is aggrieved.

B. *Effect of Pre-existing Agreements*

Section 211(c)(2) of the FPA provides that the Commission cannot order transmission service

> which requires the transmitting utility subject to the order to transmit, during any period, an amount of electric energy which replaces any amount of electric energy --
>
> A) required to be provided to such applicant pursuant to a contract during such period, or
>
> B) currently provided to the applicant by the utility subject to the order pursuant to a rate schedule on file during such period with the Commission: Provided, that nothing in this subparagraph shall prevent an application for an order hereunder to be filed prior to termination of [sic] modification of an existing rate schedule; Provided, That such order shall not become effective until termination of such rate schedule or the modification becomes effective.

Florida Power does not argue in its brief that section 211(c)(2) bars us from ordering it to provide the service requested by FMPA. We discussed this issue in our Proposed Order[26] and preliminarily concluded that neither the TSAs

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[26] 65 FERC at 61,614-15.

nor other contracts between the parties bar us from ordering the service requested. We now adopt that discussion and finding on a final basis,[27] with one clarification, discussed below.

In our Proposed Order,[28] we found that section 211(c)(2) does constitute a bar to any request by FMPA for transmission of power that would replace service under the Partial Requirements (PR) tariff and service agreements. We stated that the bar would continue until the contractual obligation is terminated pursuant to the PR agreements. Because those statements could be misconstrued as ignoring the two provisos at the end of section 211(c)(2)(B), we think it important to clarify them. We interpret section 211(c)(2) to permit a section 211 applicant to file a request for transmission service prior to termination or modification of a rate schedule, and to permit the Commission to issue a proposed and/or final section 211 order granting that request, so long as the order is not made effective until the termination or modification of the rate schedule becomes effective. This interpretation is supported by the legislative history of the provisos.[29]

Accordingly, 211(c)(2) would not have constituted a bar to our issuing an order requiring Florida Power to

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[27] As noted in footnote 33, Florida Power will continue to sell power to FMPA under the PR contracts, and the service ordered here will not replace that service.

[28] 65 FERC at 61,615.

[29] The provisos were added to section 211(c)(2) by the Electricity Consumers Protection Act of 1986. 132 Cong. Rec. S7796 (April 16, 1986) and S7919-7920 (April 17, 1986)

transmit power that would replace service under the PR tariff if the effective date of the order was upon termination of the PR tariff or upon the effective date of modification of the existing rate schedule. We clarify our interpretation because of the generic implications of our statements in the Proposed Order.

C. *The Public Interest*

Under section 211(a), we may order transmission service if we find, among other things, that to do so would be in the public interest. In our Proposed Order,[30] we preliminarily found that ordering the service requested would be in the public interest. Florida Power does not argue otherwise, and we adopt the discussion and finding in the Proposed Order on a final basis.

D. *Reliability*

Section 211(b) provides that we cannot order transmission service if it would "unreasonably impair the continued reliability" of the affected systems. Our Proposed Order[31] preliminarily found that ordering the service requested need not impair reliability; no one had argued that reliability would be affected. There is no evidence that the service would impair reliability. Moreover, Florida Power does not object to the finding in the Proposed Order, and we adopt that finding on a final basis.

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[30] 65 FERC at 61,615

[31] 65 FERC at 61,125. The Proposed Order noted that FMPA and Florida Power were expected to adopt any condition needed to ensure that reliability is not affected.

E. *Rates, Terms, and Conditions*

Under section 212(a), the rates, terms, and conditions of the ordered service must

> permit the recovery . . . of all the costs incurred in connection with the transmission services and necessary associated services, including, but not limited to, an appropriate share, if any, of legitimate, verifiable and economic costs, including . . . the costs of any enlargement of transmission facilities. Such rates, charges, terms, and conditions shall promote the economically efficient transmission and generation of electricity and shall be just and reasonable, and not unduly discriminatory or preferential . . . [and] shall ensure that, to the extent practicable, costs incurred in providing the wholesale transmission services, and properly allocable to the provision of such services, are recovered from the applicant . . . and not from a transmitting utility's existing wholesale, retail, and transmission customers.

It is the application of this provision that FMPA and Florida Power disagree about. They state that, notwithstanding two months of negotiations, they have been unable to reach agreement on the important issues.[32]

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[32] FMPA states that, on November 12, 1993, it provided updated data to Florida Power, as required by the Proposed Order. FMPA Brief 1-2. See 65 FERC at 61,617 n.150. In addition to the required briefs, both FMPA and Florida Power provided a list of "principles" summarizing their positions. See FMPA Brief, Volume II, Appendix A; Florida Power Brief, Attachment 1. Both briefs contain several volumes. In this order,

We note that the parties agree on the basic principle that FMPA should have access to Florida Power's transmission system that is equal to Florida Power's own use of the system. However, they do not agree on how that principle should be reflected in the calculation of the rate -- that is, on how they should share the costs of that system. FPL argues that costs should be shared on the basis of FPL's and FMPA's load ratio shares, i.e., based on their relative native loads that receive network service.[33] FMPA argues

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all references are to the first volume of each party's brief, unless otherwise noted. FMPA and Florida Power agree that cost-of-service issues not raised in their briefs will be resolved in Florida Power's pending rate case, Docket No. ER93-465-000. We interpret this to mean that Florida Power will begin providing network service pursuant to the cost-of-service principles it proposed in Docket No. ER93-465-000, except in those instances in which the Commission has already modified Florida Power's proposal in Docket No. ER93-465-000 or its proposal in this docket. If we further modify the cost-of-service principles in that docket, Florida Power will make conforming changes to the service provided in Docket No. TX93-4-000, including making refunds with interest pursuant to 18 C.F.R. 35.19a (1993), retroactive to the date on which service began.

[33] n33 Florida Power's proposed charge for network service is the product of Florida Power's annual embedded transmission costs and the ratio of (1) FMPA's members' system loads to (2) the sum of FMPA's members' system loads and Florida Power's system loads. Based on the system loads of FMPA members located in Florida Power's service area (435 MW), FMPA would be responsible for 2.88% of Florida Power's annual transmission costs. To the extent that Florida Power sells power to FMPA, as it will continue to do under the PR contracts, Florida Power would adjust the charge to ensure that it did not charge twice for transmission, reducing the network transmission load ratio from 2.88% to 2.43%. FMPA and Florida Power will share the average cost of any

that it should pay based on its contract demand, i.e., based on the maximum power flows it places on the transmission system during each year.[34] n34 Each party argues that adoption of the other's position will violate important policies. FMPA argues at some length that Florida Power's proposal is unduly discriminatory and that Florida Power's proposed rates will stifle competition and violate the Energy Policy Act. Florida Power argues repeatedly that its native load customers should not subsidize FMPA.

We agree that rates for service ordered under section 211 cannot be unduly discriminatory and cannot subsidize the applicant at the expense of the transmitting utility's existing customers. The difficulty is not in agreeing with

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redispatch costs occasioned by constraints; that is, if Florida Power must operate its resources out of economic dispatch because of transmission constraints, FMPA will pay its load ratio share (currently 2.43%) of Florida Power's redispatch costs. Similarly, if FMPA must operate its resources out of economic dispatch, Florida Power will pay its load ratio share (currently 97.57%) of FMPA's redispatch costs. Decisions as to whose resources should be redispatched due to a transmission constraint will be based on a least cost standard; whichever redispatch scenario is least costly overall will be adopted.

[34] FMPA proposes to specify its contract demand as 310 MW, of which 70 MW is currently paid for as part of its power purchase rate from Florida Power and 240 MW would be viewed as network transmission service. FMPA states that, while it would expect complete flexibility to dispatch any resource to meet any load, it would dispatch its resources so that its total load on the Florida Power transmission system in any hour did not exceed its contract demand. Under FMPA's proposal, its charges would be reduced by at least 30% when compared to those under Florida Power's proposal.

these policies, but in deciding what price/cost allocation correctly reflects them.

1. Pricing/Cost Allocation

a. *FMPA's Position*

According to FMPA, the principal issue is the amount of network transmission service to be purchased.[35] It states that it now purchases approximately 227 MW of point-to-point transmission for its IDO Project members under its existing TSAs, and anticipates that it will need a comparable amount, that is, 240 MW of firm network transmission, to efficiently integrate its existing resources.[36] It argues that its proposal will result in rates that are not unduly discriminatory, which FMPA says means service that affords it use of Florida Power's transmission system on an equal basis with Florida Power.[37] FMPA proposes a monthly rate per kW of network transmission service equal to the average embedded annual costs of Florida Power's transmission system divided by FMPA's annual peak load on the transmission system.[38]

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[35] FMPA Brief at 2.

[36] Id. at 9; see also id. at 2, 7, 14 n.9.

[37] Id. at 92. FMPA Brief at 92. Examples of discriminatory use, according to FMPA, include "a discriminatory advantage in use of the ties or priority use of the network, or if [Florida Power] can limit FMPA's transmission system under the network rate so that it must pay duplicative transmission under other schedules." Id. See also FMPA Principles at 14.

[38] Id. at 92; see also id. at 58; FMPA Brief, Volume II at 14-15. Alternatively, if Florida Power retains advantages in use of the network, FMPA proposes that the monthly rate per KW should be the sum of Florida Power's generating capacity, firm purchases, and firm

FMPA proposes to measure its monthly demand in terms of a monthly contract demand that

> shall be the maximum 60-minute coincident amount of energy from FMPA resources transmitted over the [Florida Power] transmission network during the month except for energy (a) received by or provided by [Florida Power] for FMPA under other arrangements that provide for [Florida Power] transmission charges, . . . or (b) received or delivered by FMPA as inadvertent energy. [39]

FMPA argues that it proposes just and reasonable, cost-based rates that are consistent with sections 205 and 206.[40] Moreover, FMPA asserts, its proposal is consistent with Commission precedent under which "unit rate transmission costs should be based upon an allocation of transmission capability."[41] FMPA argues that its proposal will ensure that "equivalent users will be proportionately

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transmission services, divided by twelve. FMPA Brief at 58. Since Florida Power agrees that use of the transmission system should be equal, we need not discuss this alternative.

[39] FMPA Brief, Volume II, Appendix A at 8. See also FMPA Brief, Volume I at 42-43. FMPA proposes to hold itself responsible for losses based on system average loss rates by providing energy to make up losses as necessary to meet FMPA's loads, or by buying energy from Florida Power to cover losses, "as FMPA decides, on reasonable notice to [Florida Power]." FMPA Brief, Volume II, Appendix A at 8-9. FMPA also proposes that when it inadvertently takes service over its contract demand, it will pay extra charges.n40 Id. at 92; see also id. at 58-62, 93-96.

[40] Id. at p. 92; see also id. at pp. 58-62, 93-96.

[41] Id. at 59. In support, FMPA cites Northeast Utilities Service Company, 62 FERC P61,294 (1993), reh'g pending.

responsible for their demand on the network and will pay their fair share of all costs, including reserve capacity, based on their loads on the network."[42] It also argues that its proposal is non-discriminatory and therefore consistent with the Energy Policy Act's goal of encouraging the development of competitive wholesale power markets.

FMPA argues that although Florida Power attempts to frame the issue as a rate matter, the real issue is whether Florida Power can determine for FMPA how much transmission FMPA must buy from Florida Power. FMPA urges the Commission to reject Florida Power's proposal as contrary to both legal and equitable principles.[43] Specifically, FMPA argues that Florida Power's proposal is unjust and reasonable because FMPA would be required to purchase an amount of transmission service "far in excess of the amount of network service FMPA wants or needs or can use and far in excess of the amount of point-to-point service FMPA now purchases."[44] Such a requirement, FMPA argues, is contrary to established Commission precedent and industry practice, which permit a buyer to define the amount of service it wishes to purchase.[45]

In support of its assertion that Florida Power elevates the price of network service by inflating the amount FMPA must purchase, FMPA argues that Florida Power ignores the fact that "the configuration of FMPA's loads and resources . .

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[42] FMPA Brief at p. 59.
[43] FMPA Brief at 6.
[44] Id. at 92; see also id. at 14-19, 92-96.
[45] Id. at 22-29.

. is different from the configuration of loads and resources on [Florida Power's] system," that is, that a number of FMPA's IDO members will be served by local generation.[46] Thus, according to FMPA, Florida Power's proposal has nothing to do with how FMPA will use Florida Power's transmission system to network its resources.[47] In addition, FMPA argues, Florida Power increases the effective charge for network service "by narrowly defining the service and insisting that FMPA pay separate, additional charges for service that should be subsumed within a reasonable definition of network service." [48]

FMPA also argues that Florida Power's proposal would discourage competition in general, as well as harming FMPA,[49] and thus would be inconsistent with the Energy Policy Act's goal of encouraging competition.[50] It argues that if transmission owners can force potential transmission buyers to purchase more network transmission service than necessary, network transmission service will be under-utilized, with the result that efficient transactions are

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[46] Id. at 9.

[47] Id. at 14. FMPA also argues that Florida Power's proposal is unreasonable "viewed from a historical perspective;" FMPA asserts that it was Florida Power that forced the Cities to rely on local generation by blocking their alternatives. Id. at 16; see also id. at 17-18. Florida Power disagrees; it also argues that the Commission is not authorized to provide for reparations for any past wrongs. Florida Power Brief at 58-63. We need not resolve this issue. Our decision in this order is not based on the parties' past actions.

[48] FMPA Brief at 93 (footnote omitted).

[49] Id. at p.4

[50] Id. at 22; see also id. at 20-22, 97-108.

foreclosed.[51] FMPA further argues that Florida Power's proposal is inconsistent with antitrust laws, which recognize the duty of a monopolist to provide access to competitors on non-discriminatory terms, particularly where the monopolist controls an essential facility.

b. *Florida Power's Position*

Florida Power agrees that FMPA should receive service as good as that Florida Power provides for itself. It asserts that the primary unresolved issue is not the amount or quality of network transmission service FMPA desires, but the non- discriminatory way to allocate the costs of Florida Power's transmission system between Florida Power and FMPA.[52] Florida Power states that its pricing proposal "not only provides FMPA with full network service for the IDO Project, it permits FMPA to use [Florida Power's] transmission grid in the same manner and on the same basis that [Florida Power] uses it to serve its native load."[53] Under its proposal, "FMPA and [Florida Power] will share the fixed costs of [Florida Power's] transmission system in proportion to the amount of their load that receives network service,

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[51] Id. at 21. FMPA states that should the Commission adopt Florida Power's proposal, the IDO Project will very likely not be implemented, because the cost savings from more efficient operation of FMPA's resources will be eliminated entirely in the short term and almost wiped out on a long-term basis. Id. at 20. Florida Power disagrees. Brief of Florida Power at 63- 68. We need not address this issue. Our rate decision is not based on the economic viability of the IDO Project. See footnote 9.

[52] Florida Power Brief at 24-25; see also id. at 2, 4, 23.

[53] Id. at 21.

with each kW of [Florida Power] and FMPA load served by the network bearing the same amount of costs." [54]

Specifically, Florida Power proposes to recover its fixed costs through a monthly charge that reflects the ratio of FMPA's peak network service load coincident with Florida Power's system peak load.[55] The primary component of the monthly charge for network service would be a fixed investment charge that equals the costs of the Florida Power transmission system, multiplied by the ratio of FMPA's network load to Florida Power's total load.[56] Florida Power proposes to determine FMPA's network load as the sum of the average twelve monthly peak demands (12-CP demands) of FMPA's IDO members coincident with Florida Power's monthly peak demands. Florida Power states that its total load is Florida Power's average 12-CP demands including

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[54] Id. at 13 (footnote omitted). Florida Power explains that, under its proposal, calculation of FMPA's load is limited to FMPA's "IDO East group;" i.e., the FMPA member cities located within Florida Power's service area (the Cities of Jacksonville Beach, Green Cove Springs, Clewiston, Vero Beach, Fort Pierce, Lake Worth and Key West, Florida). Id. at 13-14 n.16. Florida Power states that it proposes to treat transfers of power between FMPA's IDO East group and its IDO West group (FMPA member cities located in the service territory of the Florida Power Corporation) on the same basis as transactions between FMPA's East IDO group and Florida Power Corporation. Id. Florida Power also states that the loads of the IDO West cities would not be included in Florida Power's cost allocation formula unless FMPA wishes to use Florida Power's transmission system to export power to them. Id. at 10 n.11.

[55] Id. at 14 & n.17.

[56] Id. at 82.

FMPA and other firm transmission loads.[57] It also states that its proposed monthly charge would also include charges to recover the costs of any network upgrades, direct assignment facilities, FMPA's share of redispatch costs incurred to alleviate constraints, regulatory expenses, assessments by the Commission, and taxes and fees.[58]

Florida Power argues that its proposal fosters effective competition and encourages utilities to perform efficiently and thus is consistent with section 212(a), with sound transmission pricing policy, and with the Proposed Order.[59] It says that section 212(a) directs the Commission to ensure that a transmitting utility's native load customers do not bear costs properly allocable to transmission customers and argues that only its proposal meets this requirement.[60] Florida Power argues that its proposal is non-discriminatory in that all loads that receive network service receive equal access at equal cost. It also argues that its proposal is consistent with the principle of the Commission's transmission pricing policy that fixed costs should be recovered through charges that are as fixed as practicable.[61] It says that if a transmission customer can force its competitors to bear a disproportionately high share of the

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[57] Id. at 83. Florida Power adds that all 12-CP demands would be calculated from five-year rolling averages and would reflect Florida Power's system average losses. Id.

[58] Id. at 83; see also Florida Power Brief, Volume II, Appendix A, Article IX at 39-43.

[59] Id. at 39; see also 21-22, 37-43.

[60] Id. at 38.

[61] Florida Power Brief at p.40

fixed common costs of the transmission system, competition will be skewed and prices will not reflect relative efficiency.

In addition, Florida Power argues that its proposal is consistent with established Commission cost allocation principles.[62] Florida Power asserts that its proposal is similar to tariffs containing network service features approved by the Commission in other proceedings.[63] For example, Florida Power argues that its proposal is consistent with a transmission service agreement between Northeast Utilities Service Company (NU) and the Connecticut Municipal Electric Energy Cooperative (CMEEC) (NU-CMEEC Agreement).[64] Florida Power argues that its proposed pricing methodology is comparable to the NU-CMEEC Agreement because "all resources of CMEEC that are integrated with its load are counted in determining the load ratio share,"[65] and, therefore, both Florida Power's proposal and the NU-CMEEC Agreement "provide[ ] for transmission service that places the transmission customer on a par with the transmitting utility's native load customers, but properly allocates transmission network costs to the transmission

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[62] Id. at p.43; se also id. at pp. 13-14, 37, 45-50

[63] Id. at pp. 43-50

[64] Northeast Utilities Service Company, 56 FERC 61,269 at 62,049-50 (1991), order on reh'g, 58 FERC 61,070, order denying reh'g, 59 FERC 61,042, aff'd in relevant part, Northeast Utilities Service Company v. FERC, 993 F.2d 937 (1st Cir. 1993), order on remand, 66 FERC 61,332 (1994). The NY-CMEEC Agreement was the result of a settlement, and thus does not, in itself, have precedential effect. However, in the cited order, the Commission ordered NU to abide by its commitment to make the same arrangement available to other transmission dependent utilities.

[65] Florida Power Brief at 47 (emphasis in original).

customer based on the customer's load ratio share of total load on the network."[66]

Florida Power asserts that FMPA would place an upper limit on its responsibility for the costs of Florida Power's network on the basis of a specified contract demand even though the total combined loads of its IDO member cities located within Florida Power's service area will benefit from the integration service[67]. It says that FMPA proposes to pay on a different basis than Florida Power even as it receives equal service, while FMPA's share of grid costs would be allocated based on the amount of transfers of power over Florida Power's system from FMPA's resources to distant load centers is equivalent to FMPA's.[68] In other words, in Florida Power's opinion, FMPA's method of allocating the costs of Florida Power's transmission grid is based on a contrived number reflecting FMPA's operation of its resources out of economic dispatch (an action that is directly at odds with the full integration of resources) in order to limit the maximum power flow on Florida Power's system in each hour.

Florida Power points out that in order to provide FMPA with the flexibility it wants, it would have to plan its system and incur fixed costs that take into account FMPA's 435 MW of loads to be served from the transmission system, not the amount of the power flowing over the transmission system from hour to hour or from year to year. Florida Power

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[66] Id.
[67] Florida Power Brief at pp. 15.
[68] Id. at p. 16.

states that it "would be required to plan its system to serve the load at each [IDO Member] from remote generation, but would be paid only for the maximum amount of power that flows into its system coincidentally at any time."[69]

In response to FMPA's argument that FMPA should pay less to the extent that generation is located on the systems of its IDO Members, Florida Power states that it also has generation located at its load centers and that the rolled-in cost of the transmission grid already reflects the cost savings associated with these siting decisions.[70] Moreover, Florida Power argues, when FMPA's planned use of the transmission grid for power transfers is compared to Florida Power's actual use of the grid, "it becomes readily apparent that FMPA will rely on transferring power across the network to load centers to a much greater extent than [Florida Power] does."[71] In fact, if FMPA's rationale is applied on an equal basis to both its and Florida Power's operations, "it would require that FMPA be allocated a much greater share of network costs than under a load ratio share approach."[72] Florida Power also argues that FMPA's approach ignores the way integrated power systems operate and the fact that FMPA wants to integrate all of its dispersed resources, including its reserves, with its total loads from hour to hour.[73]

c. *Resolution*

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[69] *Id.* at p. 3.
[70] *Id.* at p. 4.
[71] *Id.* at p. 26; see also id. at pp. 54-57.
[72] *Id.* at pp. 25-26 (footnote omitted).
[73] *Id.* at p. 51.

We will adopt Florida Power's proposal, with certain changes.[74] The proposal recognizes that a transmission system is designed to meet the needs of native load and that the needs of native load are defined primarily by the size of the load to be served. It incorporates FMPA's load as though that load were part of Florida Power's native load. Because the transmission system to support this hypothetical melding of customers must be designed and operated -- and fixed costs must be incurred -- to meet the combined loads of Florida Power and FMPA, it makes sense that each would pay based on its contribution to the system loads to be served by the transmission network. The costs of the system will not vary as a function of the maximum flows imposed by FMPA in a given year. They will vary based on the loads to be served.

FMPA opposes this proposal on the ground that it forces FMPA to pay for services that it does not want. FMPA argues that, because it has the ability to serve some of its loads without using Florida Power's transmission system, it can limit its aggregate impact on Florida Power's transmission system in each hour to a particular level, initially 240 MW. While FMPA may be able to limit its flows on the Florida Power's transmission system in any hour, this fact is not dispositive. FMPA wants to be able to serve all loads from local or remote resources, at its discretion. It wants to receive service of exactly the same

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[74] Our rulings in this order are limited to the issues and facts of this case as presented by the parties. We may reach different conclusions in other cases based on different proposals by the parties, different facts, or the outcome of our pending inquiry on transmission pricing.

quality as the service Florida Power provides itself. It wants to be able to use Florida Power's transmission system as freely as Florida Power uses the system to serve Florida Power's native load.[75] To provide such service, Florida Power must plan for FMPA's load in the same way it plans for its own load. Only in this manner can Florida Power maintain a transmission system capable of taking in power from every FMPA resource and meeting the total load of each FMPA member that participates in the IDO Project at all times.

Since Florida Power must plan its transmission system to meet load, not based on FMPA's actual hourly or yearly demands, its compensation for the network transmission service should not be driven by FMPA's hourly economic dispatch decisions. Since FMPA wants to be able to use the transmission system exactly as freely as does Florida Power, it must pay a rate that reflects that equality. It must share the costs of the system on the same basis as does Florida Power -- on the basis of its load.

The flaws in FMPA's proposal are evident if we step back and look at the investments FMPA would have to undertake if it had to construct its own transmission network. Depending on how it configured its system, it could construct a system to integrate resources with two members, or it could construct a system to integrate resources with all members

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[75] In FMPA's July 21, 1993 Complaint at p. 55, FMPA stated that "for FMPA to be able to operate and plan its generation on an integrated basis, it must use [Florida Power's] transmission system on a network basis like [Florida Power] uses its transmission system for its own needs." Also see FMPA complaint at 27, 62, 64; FMPA Brief at 40-41.

located within Florida Power's service area and still have a maximum system transmission load of 240 MW. These obviously would be two very different systems with different capabilities and different fixed costs even though FMPA could operate in any hour to ensure that the maximum power flows on either system were 240 MW.

FMPA offers an alternative proposal that incorporates Florida Power's load ratio approach, but reduces FMPA's obligation by the amount of its loads that can be served by local resources. If the Commission does not accept this alternative, FMPA proposes a further compromise that would give it a credit for facilities located in Key West (which are routinely run for reliability purposes and not likely to participate in an economic dispatch) as well as other unidentified generating units that FMPA states are run for local support and stability. [76] These proposals, however, must be rejected. They limit the generation credits to FMPA. Florida Power also has the ability to serve loads from nearby resources and, if FMPA's alternative were adopted, would be

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[76] Under either compromise proposal, FMPA argues that it should also be credited for its transmission facilities that, according to FMPA, will be part of the combined Florida Power/FMPA transmission grid. If FMPA has transmission facilities that will operate as part of the integrated transmission system, a credit would be reasonable. Indeed, this is in line with Florida Power's position that it is redefining the native load served by the Florida Power transmission system to include all of FMPA's resources and loads. If FMPA owns grid facilities that are now used to integrate the same resources and loads, those facilities are part of the integrated transmission system, and Florida Power must include an appropriate credit for any such grid facilities when it submits its compliance filing in this case.

entitled to similar generation credits.[77] Florida Power points out that if generation credits for all local resources (Florida Power's and FMPA's) are adopted, FMPA's cost responsibility would be twice the level it is under Florida Power's proposal.

2. Changes in Amount of Service

FMPA proposes that, on one year's notice, it should be able to increase or decrease its contract demand by the greater of 25 MW or 15 percent (or a higher amount, if such amount would not result in constraints on Florida Power's transmission system on a year-to-year basis). FMPA also proposes that it may increase its contract demand on four years' notice, except to the extent that a transmission reliability constraint limits the increase and cannot be remedied within four years.[78] FMPA states that, under its proposal, it would keep Florida Power apprised of "any

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[77] FMPA argues that Florida Power's local resources should be treated differently because all are connected to the grid, while FMPA's generating units can meet local loads without first entering the Florida Power grid. This is not a meaningful distinction. Regardless of where the resources are located, FMPA wants Florida Power to plan its transmission system to integrate all of FMPA's resources with all of FMPA's loads that are located in Florida Power's service area. If FMPA has a load and resource that it does not want to integrate, it can isolate the load and resource from Florida Power's transmission system and eliminate it from the request for full integration.

[78] FMPA Brief, Volume II at pp. 4-5; see also FMPA Brief, Volume I at pp. 38-39. FMPA also proposes that in the event of unanticipated circumstances, it may reduce its contract demand more than 15 percent "as may be reasonable under the circumstances." FMPA Brief, Volume II at p. 5.

actual or potential significant changes" in FMPA's use of Florida Power's transmission system.[79]

Since we are requiring FMPA to pay its share of the costs of the transmission system based on its load, rather than based on contract demand, this issue is no longer relevant.

3. Other Uses of the Network by FMPA

Florida Power argues[80] that if FMPA wishes to export power to other utilities from network resources located in FMPA's control area, under circumstances in which if Florida Power were making the sale it would charge itself and credit the revenue back to Florida Power's transmission system, this service should not be treated as part of the network service. Instead, FMPA should have to buy transmission service under Florida Power's regular transmission tariff. Florida Power argues that this is equivalent access.

Moreover, Florida Power would not allow FMPA to resell network transmission service to others. Again, Florida Power argues that this is equivalent access because, when Florida Power sells transmission service to third parties, that revenue is credited to the transmission system, thus reducing FMPA's cost responsibility for the system.

FMPA's position[81] is that to the extent that it has excess transmission capacity available (that is, when

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[79] *Id.* at p. 5; see also FMPA Brief at pp. 77-78.
[80] Florida Power Brief at pp. 83-85.
[81] FMPA Brief at pp. 53-56.

deliveries to IDO Members are less than its contract demand), FMPA should be able to either use that capacity to sell power to others or resell the capacity. It argues that there is no justification for charging FMPA when it makes off-system sales. FMPA states that Florida Power's requirement for revenue credits charges twice for transmission service.

These differences in position are a result of the parties' different views on the basic pricing issue, as discussed above. As FMPA sees it, FMPA will have excess capacity available when it uses less than contract demand, while Florida Power believes that FMPA can never have excess capacity available, since FMPA should be paying for load-following service and thus has no entitlement above its load.

We agree with Florida Power. Network service for meeting its load [82] does not give FMPA the right to use the system to export power at no charge. Florida Power will not be charging twice for the same service. For taking network service, FMPA will share proportionately in the costs of the transmission system. Whenever the transmission system is used for another purpose, the revenues should be shared by Florida Power and FMPA for the benefit of their native loads on the same basis as that on which the costs were shared. To ensure that the revenue credits generated by Florida Power's off-system sales are the same as those generated by FMPA's

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[82] FMPA has requested network service to integrate its loads located within and adjacent to Florida Power's service area with its generation located within and without Florida Power's service area. supra. n.4.

off-system sales, Florida Power must adopt the tariff rate as the basis for computing the transmission revenues for its off-system sales.

We also find Florida Power's resale restriction to be reasonable and consistent with the load ratio approach to cost allocation that we are adopting. FMPA henceforth will have the same rights and priority to use the grid in serving its "native load" that Florida Power has in serving its "native load," and will share the costs and benefits on the basis of load. It cannot reassign that status to another transmission user. Transmission customers who seek a different arrangement, e.g., point-to-point service through Florida Power's grid, are required to contract separately for their services, and the revenue realized from these other transactions will be shared by Florida Power and FMPA in proportion to their loads.

Finally, Florida Power states that, if FMPA wants to export power from resources located in Florida Power's service area to FMPA's loads in Florida Power Corporation's service area, FMPA will have the option of either (1) obtaining point-to-point transmission service under the tariff; or (2) including the loads of FMPA members that are in Florida Power Corporation's service area in the load ratio as part of the network service.[83]

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[83] We note that the second alternative would require a separate request for transmission service under section 211, if the service is not provided voluntarily.

FMPA's objection to this proposal is founded on its objection to pricing any portion of the service on a load ratio basis. As discussed above, we are adopting the load ratio method. Florida Power has reasonably recognized that the FMPA loads in Florida Power Corporation's service area cannot be served directly from the Florida Power integrated grid and that some other arrangement may be appropriate.

4. Limits on Designation of Substitute And New Network Resources

Both parties agree that FMPA should be allowed to designate substitute resources (that is, to displace an existing resource on a temporary basis because of an outage or a chance to buy cheaper energy), but FMPA believes that certain criteria should be embodied in the contract; for example, it would allow substitution whenever there is no effect on system reliability and when FMPA compensates Florida Power for any increased operating costs. FMPA also opposes Florida Power's proposal to require up to five years' notice for the addition of new resources. (These differ from substitute resources in that they are in addition to, not in lieu of, existing designated resources.) FMPA recognizes that Florida Power commits to allow substitution of a new resource without the notice if the parties mutually agree, but is concerned that there is no standard to guide the decision.[84]

Florida Power must allow substitution whenever it can be reliably accommodated because this is the same

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[84] FMPA Brief at p. 44.

standard that Florida Power would apply to its own resource substitution. With respect to new resources, we recognize the tension between Florida Power's need for sufficient time to plan for a new resource (such as a new power plant that will require interconnection to the grid) and FMPA's concern that the notice period be flexible so that Florida Power cannot delay a new resource that can be accommodated on short notice (such as a purchase over an existing interface with sufficient capacity to accommodate immediately a new FMPA transaction). Florida Power must revise the notice provision to allow FMPA to request a new resource on less than five years' notice. If FMPA makes such a request and Florida Power refuses, FMPA may file a complaint with the Commission. However, we also encourage the parties to adopt a dispute resolution procedure such as arbitration to deal with any problems of this nature that may arise.

5. Access to Interconnections for New Generating Resources

FMPA argues[85] that it should have access to Florida Power's interconnections with other utilities that is the same as its access to any other part of the system and the same as Florida Power's access. When a new network generating resource is involved, FMPA would give Florida Power reasonable notice, and Florida Power would have to try to accommodate the new resource. FMPA argues that if simultaneous firm demands on an interconnection are excessive, Florida Power and FMPA should adjust their dispatch on the same basis.

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[85] FMPA Brief at pp. 29-36.

FMPA and Florida Power agree that existing uses of interconnections should be grandfathered. However, FMPA argues that Florida Power's method of grandfathering is discriminatory in that Florida Power proposes to grandfather its own uses of the interconnection without limitation, while grandfathering FMPA's rights to capacity only for specific designated network resources, so that the grandfathering ends when a resource is retired.

Finally, FMPA objects to what it interprets as Florida Power's position that unless FMPA buys firm network transmission capacity equal to the loads of members that are outside of Florida Power's transmission area, FMPA cannot include these members in a single control area with its other members. It states that Florida Power wishes to prevent FMPA from pooling with and getting control area services from non-members.

Florida Power agrees that FMPA should have access to interconnection facilities that is equivalent to Florida Power's.[86] FMPA's use of these interconnections should be based on FMPA's load ratio percentage, just like its use of the rest of the system.

Florida Power says that both its and FMPA's existing firm resources should be grandfathered, as well as replacements of those uses. Any extra capacity should also be allocated based on load ratio percentages.

We conclude that FMPA should be allowed to use interface capacity for new generating resources on an equal

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[86] Florida Power Brief at pp. 78-80.

basis with Florida Power -- that is, up to its share of the load, 3%. The rationale for using the load ratio share as a basis for cost allocation applies here as well. The costs of the grid should be allocated on the basis of the loads served on the grid, not on the basis of FPL's and FMPA's use from time to time, let alone on the basis of the relative use of discrete facilities that make up the grid. Indeed, there are no restrictions on the use of other parts of the transmission system. If the interfaces are constrained, Florida Power and FMPA should simply redispatch and share the redispatch costs and, ultimately, Florida Power will build new facilities when needed. The interfaces are just another part of the transmission grid, and Florida Power must plan and operate the grid, including the interfaces, to meet the combined needs of Florida Power and FMPA on an equal basis. When there are conflicting needs to use the same interface capacity, the parties have already agreed that the combined Florida Power and FMPA systems will be redispatched and the costs shared. When the grid, including interfaces, needs to be expanded, Florida Power will undertake the expansion on behalf of the combined system.

Finally, Florida Power must revise the grandfathering criteria to make the criteria applicable to FMPA the same as those applicable to Florida Power.

6. Incremental Transmission Network Upgrades

Florida Power proposes that it and FMPA each bear the incremental costs of new transmission facilities that must be built because of the decisions each makes about where to locate new generation facilities. It argues that this direct

assignment approach, rather than rolling in the costs, is necessary in order to hold its native load customers harmless.[87] Florida Power states that, if the incremental costs of network upgrades that would not have been incurred but for the addition of a new FMPA resource are rolled into the embedded cost pot, Florida Power's customers will end up paying for 97% (Florida Power's current load ratio responsibility) of the cost, and that this would be a subsidy. Its proposal is economically sound because it gives FMPA the correct price signal in making siting decisions, Florida Power says. It states that its proposal is evenhanded because it will apply to Florida Power as well because FMPA will not be required to pay as part of its embedded cost rate the incremental network costs associated with Florida Power's new resources.

FMPA argues that the costs of improvements should be rolled into the transmission rate base.[88] It says that this is how Florida Power treats the cost of improvements that are needed to serve Florida Power's native customers. It also argues that Florida Power's proposal will be difficult to administer because of disagreements about the extent to which an improvement is needed to serve FMPA's or Florida Power's load. Moreover, FMPA says that the license conditions on Florida Power's St. Lucie nuclear license provide that all transmission upgrades must be considered to benefit Florida Power. Finally, FMPA argues that Florida Power must eliminate from the rolled-in rate the costs of

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[87] Florida Power Brief at pp. 68-74.
[88] FMPA Brief at 71-77.

already-built facilities that were built to serve Florida Power's native load.

We do not believe it appropriate to resolve this issue now. The driving force behind FMPA's request for transmission service is its desire to integrate its existing load located within Florida Power's service area with its existing resources both within and without that area, and neither party suggests that either FMPA's or Florida Power's load will require transmission upgrades in the near future. Thus, the issue of how to price such upgrades is not pressing. Moreover, we are presently considering transmission pricing issues in a generic proceeding.[89] We will defer deciding this pricing issue until Florida Power actually proposes a specific upgrade necessary to accommodate the transmission service requested in this docket or to meet its own needs. At that time, Florida Power should file a petition for a rate order in a new subdocket in Docket No. TX93-4.

7. Other Transmission Services

FMPA argues[90] that it should be able to buy other transmission services (such as short-term firm, interruptible, etc.) from Florida Power to supplement the network service. It says that Florida Power's position would force FMPA to meet all its transmission needs through firm, long-term power, precluding other transmission services.

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[89] Inquiry Concerning the Commission's Pricing Policy for Transmission Services Provided by Public Utilities Under the FPA, Notice of Technical Conference and Request for Comments, 64 FERC P61,109 (1993).

[90] FMPA Brief at pp. 64-68.

It appears to us that this issue is now moot. Since we will require FMPA to pay for network service based on its load, it will be entitled to use all services Florida Power provides itself. If FMPA does need service that it thinks is part of the network service and Florida Power refuses to provide the service as a network service, FMPA may file a petition to resolve this issue in a subdocket of Docket No. TX93-4.

8. Ancillary Services

FMPA is concerned[91] that to the extent that ancillary services are not considered to be part of the transmission function, and thus are not included in the charge for network service, Florida Power may not make them available on a non- discriminatory basis. It asks the Commission to provide a procedure for evaluating whether that is the case when either Florida Power makes a filing related to these services or FMPA files a complaint.

It appears that the various types of ancillary services will be available on a non-discriminatory basis. Florida Power has committed itself[92] to provide, as part of the network service, operating reserves and regulation service and to maintain voltage levels. FMPA will not need back-up transmission service, since it will have full use of the transmission network.

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[91] FMPA Brief at p. 69.

[92] Brief of Florida Power, Principles (Attachment 1) at p. 16.

III. Further Procedures

We will require Florida Power to make a compliance filing reflecting the decision made in this order. That filing will be a rate filing under section 205 of the FPA, since it will be a rate charged by a public utility for "any transmission . . . subject to the jurisdiction of the Commission. . . ." 16 U.S.C. 824d(c) (1988). We will deem the filing to be an initial rate under section 205. Thus, the procedural provisions of sections 205(d) and (e) that relate to rate changes (such as 60-day notice and suspension) will not apply to the compliance filing.[93] The rate is effective as of the date of this order, with service to commence on the date requested by FMPA. Any future revisions Florida Power proposes to make to the rates for the service ordered herein, with one exception,[94] will also be filed under section 205 and will be treated as proposed rate changes subject to all of the provisions of section 205. If Florida Power proposes to cease providing all, or any portion of, the services ordered herein pursuant to section 211(d)(1), it must make a filing in Docket

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[93] The compliance filing to be made under section 205 will involve only whether Florida Power's filing correctly reflects this order and any revisions the Commission may order on rehearing of this order. Thus, FMPA and other parties must raise any issues decided in this docket on rehearing of this order; they may not raise them again at the section 205 compliance stage.

[94] For the one issue that is deferred in this order, incremental upgrades, a subsequent order will be issued in this docket if such upgrades are proposed. Therefore, if Florida Power or FMPA propose incremental upgrades, they should file proposed rates in Docket No. TX93-4; the rates will be evaluated under sections 211 and 212.

No. TX93-4 and the matter will be evaluated under sections 211 and 212.

Finally, if FMPA decides that it wants to change in any fashion the service it has requested in this proceeding, i.e., to integrate its members' resources that are in Florida Power Corporation's service area or elsewhere, and wants the Commission to order any necessary transmission, it must file a new request for transmission services in a new TX docket under sections 211 and 212.

The Commission orders:

(A) The motion to intervene by Direct is hereby granted.

(B) All pleadings by FMPA and Florida Power other than their Briefs are hereby rejected.

(C) Florida Power must make a compliance filing consistent with this order within 60 days of the date of this order.[95]

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[95] We may extend this period if both FMPA and Florida Power so request.

65 F.E.R.C. ¶ 61,125

FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Elizabeth Anne Moler, Chair; Vicky A. Bailey, James J. Hoecker, William L. Massey, and Donald F. Santa, Jr.

Florida Municipal Power Agency
v. Docket No. TX93-4-000
Florida Power & Light Company

ORDER NOTING AND GRANTING INTERVENTIONS; PROPOSED ORDER DIRECTING NETWORK TRANSMISSION SERVICES; AND ESTABLISHING FURTHER PROCEDURES

October 28, 1993

On July 2, 1993, Florida Municipal Power Agency (FMPA) filed a complaint in Docket No. EL93-51-000 against Florida Power & Light Company (Florida Power). In its complaint, FMPA requests, inter alia, that the Commission find that certain "access limitations" of existing transmission service agreements (TSA) pursuant to which Florida Power provides transmission services on behalf of

FMPA's members (municipals)[1] are unjust, unreasonable and unduly discriminatory under section 206 of the Federal Power Act (FPA).[2] More specifically, FMPA requests that the Commission direct Florida Power to provide a particular kind of transmission service; i.e., "network service,"[3] by which FMPA means "a transmission arrangement that would enable [FMPA] to distribute a given quantity of transmission

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[1] FMPA is the bulk power agent for its 26 municipal utility members located throughout the State of Florida.

[2] 16 U.S.C. § 824e (1988).

[3] We note that there is no industry-wide accepted definition of "network service;" see Policy Statement Regarding Good Faith Requests for Transmission Services and Responses by Transmitting Utilities Under Sections 211(a) and 213(a) of the Federal Power Act, As Amended and Added by the Energy Policy Act of 1992, 58 Fed. Reg. 38,964 (July 21, 1993), III FERC Statutes and Regulations P30,975, at pp. 30,863-64 (good faith policy statement). In this case, FMPA defines the term "network service" to mean transmission service under which Florida Power would transmit power without assessing multiple charges for each receipt/delivery point combination.

For example, under FMPA's definition of network service, if a power supplier had two resources (Unit A and Unit B, each with a capability of 100 MW) and two customers (Customer X and Customer Y, each with a load of 80 MW), the power supplier would pay for no more than 160 MW of transmission service, the maximum combined load of both customers. FMPA argues that, under the Florida Power's consistent practice of offering point-to-point service, Florida Power might agree to transmit power from Units A and B to Customer X and Y, but Florida Power would make the power supplier pay for 320 MW of transmission service, i.e., 80 MW of transmission service from Unit A to Customer X, 80 MW of transmission service from Unit B to Customer X, and 80 MW of transmission service from Unit A to Customer Y and 80 MW of transmission service from Unit B to Customer Y.

network usage among various delivery points, without paying multiple monthly or yearly transmission charges."[4]

In the event the Commission does not deem appropriate the relief FMPA requests under section 206, FMPA requests, in Docket No. TX93-4-000, that the Commission issue an order requiring Florida Power to provide network service for FMPA and its members. FMPA requests such an order pursuant to sections 211 and 212 of the FPA,[5] as amended by the Energy Policy Act of 1992 (Energy Policy Act).[6]

As explained below, we will grant FMPA's request for network transmission services in Docket No. TX93-4-000 and will establish further procedures to establish the rates, terms and conditions of such service. We will address the matters raised in Docket No. EL93-51-000 in a subsequent

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[4] FMPA Complaint at p. 25. FMPA's complaint, and its application for transmission services under sections 211 and 212, discussed infra, were submitted as one pleading. We clarify that just as a complaint cannot be filed as part of a motion to intervene, see, e.g., Entergy Services, Inc., 52 FERC P61,317, at p. 62,270 (1990), a complaint should not be combined as part of an application for transmission services under section 211 and 212 of the FPA. In this instance, since the Secretary separately docketed the complaint and application, we will not reject those portions of FMPA's pleading that comprise its complaint and require refiling. However, we expect future applicants to follow the correct procedures. The Commission will refer to those sections of the pleading that concern FMPA's request for transmission services under sections 211 and 212 as FMPA's Application and those sections that refer to FMPA's request under section 206 as FMPA's Complaint. We will refer to the attachments to the pleading simply by their Appendix designation.

[5] 16 U.S.C.A. §§ 824j-824k (West 1985 & Supp. 1993).

[6] Pub. L. No. 102-486, 106 Stat. 2776 (1992).

order, if the matters raised therein are not ultimately mooted by our action in Docket No. TX93-4-000.

I. Background

FMPA and its members own interests in generating units which are used to meet a portion of the members' power supply needs.[7] FMPA and its members also purchase partial requirements power and various interchange services (economy, short-term firm and emergency services) from Florida Power, Florida Power Corporation (FPC) and Tampa Electric Company (Tampa). Florida Power and FPC also provide FMPA and its members with certain transmission services.

During the 1970's and 1980's, a number of Florida cities instituted legal proceedings before federal courts and the Nuclear Regulatory Commission (NRC) (and its predecessor, the Atomic Energy Commission, or AEC). Those proceedings involved, inter alia, antitrust claims against Florida Power. In 1980, the Department of Justice, the NRC staff and Florida Power entered into a settlement agreement as part of the St. Lucie nuclear licensing proceeding before the NRC. As a result of the settlement, Florida Power agreed to a license condition which required it to provide certain transmission services to utilities in Florida

[7] These interests include a 75 MW interest in Florida Power's St. Lucie Nuclear Unit No. 2 (St. Lucie), a 110 MW interest in the Orlando Utilities Commission's (OUC) Stanton Energy Center Unit No. 1 (Stanton 1) and a 120 MW interest in the planned Stanton Energy Center No. 2 (Stanton 2).

(license conditions).[8] Florida Power also agreed to support Florida legislation which enabled FMPA to issue revenue bonds. As a result, FMPA has been able to participate in the ownership of interests in the noted generating units and other activities in connection with its role as a power supplier to its members. Before finalizing its power supply arrangements, FMPA needed certain transmission agreements with Florida Power in place. Accordingly, FMPA signed various transmission agreements (TSAs) with Florida Power.[9]

In the late 1980's, FMPA began investigating the feasibility of integrating and coordinating its resources. As a result of FMPA's unsuccessful efforts to form a Florida-wide power pool or a FMPA-Florida Power power pool, FMPA designed its Integrated Dispatch and Operations (IDO) Project through which FMPA hopes to dispatch, operate and plan power supply resources for participating members on an

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[8] FMPA has attached copies of the September 12, 1980 Joint Motion of Department of Justice, NRC Staff and Applicant [Florida Power] to Approve and Authorize Implementation of Settlement Agreement, the appended Stipulation, contained in Appendix 21, and a copy of the St. Lucie Plant Unit No. 2 Construction Permit (No. CPPR-144, Amendment No. 3), issued by the NRC on April 24, 1981 (i.e., the license conditions), contained in Appendix 23.

[9] The TSAs that have been accepted for filing by the Commission are Rate Schedule FERC No. 72 (St. Lucie Delivery Service Agreement), dated June 27, 1983; Rate Schedule FERC No. 92 (Stanton Transmission Service Agreement), dated November 25, 1986; Rate Schedule FERC No. 93 (Stanton Tri-City Transmission Service Agreement), dated November 25, 1986; and Rate Schedule FERC No. 109 (Restated and Revised Transmission Service Agreement), dated October 2, 1990).

integrated basis.[10] In September, 1989, FMPA sent a proposed TSA and, concomitantly, a formal request for network transmission service for the IDO Project to Florida Power. FMPA and Florida Power negotiated and exchanged information over approximately two years, but the parties were unable to reach agreement concerning the terms of such transmission service. In December, 1991, FMPA instituted legal proceedings against Florida Power in Florida state court (removed by Florida Power to the federal district court for the Middle District of Florida) in which FMPA asserts claims to relief under contract law, Florida antitrust statutes and, as amended after removal, Federal antitrust laws.[11]

Recently, in Docket Nos. ER93-465-000 and ER93-922-000, Florida Power filed a new transmission tariff which provides for point-to-point services and revised rates for virtually all of its requirements tariffs, transmission agreements and interchange agreements.[12] In these filings, Florida Power completely restructured its wholesale power and transmission arrangements with utilities in Florida.

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[10] FMPA Complaint at p. 1. The municipals which receive their power supply from FMPA through the IDO Project are all located within or adjacent to Florida Power's territory, or are interconnected directly or indirectly with Florida Power's transmission system. Id. at p. 13.

[11] The case is docketed as Florida Municipal Power Agency v. Florida Power and Light Co., Case No. 92-35-Civ-Orl- 3A22; the trial is now scheduled to begin in January 1994.
FMPA states that it has also filed a petition with the NRC for a determination of its rights under the license conditions, in order "to leave no escape route for [Florida Power's] forum evasion tactics." FMPA Complaint at p. 18.

[12] See Florida Power & Light Company, 64 FERC P61,361 (1993).

FMPA intervened in Docket No. ER93- 465-000 and filed various pleadings, alleging, among other things, that Florida Power's failure to include network service in its proposed transmission tariff violates the NRC license conditions.[13] Florida Power responded that the proceeding in Docket No. ER93-465-000 was not the appropriate forum for FMPA's requests for relief. FMPA, in turn, filed its requests under sections 206 and 211 that the Commission direct Florida Power to provide network transmission service.

A. FMPA's Request for Network Transmission Service

1. FMPA's Complaint[14]

In its complaint, FMPA states that it now seeks prospective relief to enable it to implement its IDO Project, which FMPA estimates will achieve economies of approximately $ 10 million annually.[15] FMPA explains that it has created several power supply projects to date and that it has made numerous requests for network transmission service in connection with its projects prior to the IDO Project. However, according to FMPA, Florida Power has

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[13] See supra note 8 and accompanying text. FMPA raises the same allegation in Docket No. EL93-51-000, as discussed below at notes 20-32 and accompanying text.

[14] As noted above, we will address the matters raised in FMPA's complaint in a subsequent order, in the event such matters are not mooted as a result of our action in this proceeding. We have described the complaint, and Florida Power's answer, here merely to provide a more complete understanding of the matters raised by FMPA in its application for transmission services and Florida Power's response.

[15] FMPA Complaint at p. 1.

steadfastly refused to provide such service.[16] FMPA states that it had made numerous requests for network service in the years preceding its request for such service in connection with the IDO Project, and that, whereas "network transmission service was desirable, but not essential," to earlier FMPA projects, network service "is essential to permitting FMPA to integrate its resources" as proposed in the IDO Project.[17] FMPA states that "in light of the time constraints on FMPA's economic resource commitments and the controlling necessity to obtain some form of timely transmission commitment from Florida Power, FMPA was forced to accept point- to-point service limitations in those TSAs." FMPA states that the "open access" transmission tariff in Docket No. ER93-465-000 does nothing to alleviate its concerns because that transmission tariff provides only for point-to-point service.[18] Thus, FMPA requests that the Commission, pursuant to its authority under section 206, find that the rates, terms and conditions under the existing TSAs and under the transmission tariff in Docket No. ER93-465-000 are unjust and unreasonable because the agreements provide for only point-to-point transmission service.[19]

The primary basis upon which FMPA requests relief under section 206 is its argument that Florida Power's refusal to provide network service violates Florida Power's obligations under the license conditions which, FMPA asserts, require Florida Power, inter alia, to provide network

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[16] Id. at pp. 1-4.
[17] Id. at p. 12 n.8.
[18] Id. at pp. 35-36.
[19] Id. at p. 26.

transmission service.[20] In support, FMPA argues that Article X of the license conditions requires Florida Power to provide transmission "between two or among more than two neighboring entities, or sections of a neighboring entity's system which are geographically separated, with which, now or in the future, [Florida Power] is interconnected."[21] FMPA argues that the "among" requirement in the preceding quoted phrase has been given a specific, well-established meaning by the AEC and the NRC; that is, to require "transmission from any member of a coordinating group to any other member of such group," where "for each coordinating group of entities there shall be a single transmission charge."[22] FMPA argues that Florida Power, in agreeing to the license conditions, obligated itself, among other things, to provide

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[20] FMPA argues that the license conditions "establish the 'basic rules' governing transmission service which the United States government, and Florida Municipal governments, have considered necessary lest [Florida Power's] abuse of its monopoly power create a situation inconsistent with the antitrust laws, and are the primary basis for the relief requested." Id. at p. 43 (emphasis added).

[21] Id. at p. 18; see also Appendix 23 at p. 24.

[22] FMPA Complaint at p. 8. In support of its argument that the meaning of the "among" requirement is well- established, FMPA cites, inter alia, In the Matter of Louisiana Power and Light Company (Waterford Steam Generating Station Unit No. 3), 8 AEC 718, 733, 744 (Atomic Safety and Licensing Bd. 1974), aff'd, 1 NRC 45 (Appeal Bd. 1975) (Louisiana Power).

In further support of its interpretation, FMPA states that the AEC explained that the purpose of this among requirement "is to prevent multiple transmission charges for transmission of a contracted transmission entitlement among a coordinating group of two or more entities." FMPA Complaint at p. 8 (citing Louisiana Power, 8 AEC at p. 737).

network transmission service to its neighboring utility entities for a single charge.[23] However, according to FMPA, the existing TSAs fail to satisfy the "among" requirement since they only provide for transmission "between" pairs of delivery points (i.e., point-to-point transmission service).[24] FMPA notes that Florida Power "effectively offers transmission 'from A to B and from B to A,' with further permutations for C, D, etc.," but complains that it does so "all for a separate charge."[25]

Also in support of its section 206 complaint, FMPA argues that the Commission clearly has the authority, "and indeed has a duty," to enforce the license conditions in ensuring that transmission rates under the existing TSAs are just and reasonable and are consistent with the license conditions.[26] Citing Pacific Gas and Electric Company,[27]

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[23] FMPA Complaint at p. 11. FMPA states that it qualifies as a "neighboring entity" under Article I(c) of the license conditions. See Appendix 23 at pp. 1-2. In addition, FMPA notes that it is specifically named as a "neighboring entity" in Article X(d). See id. at pp. 27- 28.

[24] FMPA notes that Florida Power has stated that the existing TSAs "combine some features of point-to-point service with features of network service and thus provides FMPA with considerable flexibility." See FMPA Complaint at p. 31 n.25 (citing Florida Power's April 27, 1993 Answer in Docket No. ER93-465-000, contained in Appendix 28 at p. 32). FMPA responds that "whether [the existing TSAs] are marginally more flexible than absolutely rigid point-to-point service is not the issue. The TSAs contain substantial point-to-point restrictions which preclude economic coordination and breach [Florida Power's] license conditions." FMPA Complaint at p. 31 n.25.

[25] Id. at p. 27.

[26] Id. at pp. 39-40.

FMPA argues that "the Commission has consistently held that Antitrust Conditions must be considered where relevant to rate proceedings."[28] FMPA also argues that the Commission's jurisdiction to enforce the license conditions is concurrent with the jurisdiction of the courts and the NRC.[29] According to FMPA, although the FERC is not required to enforce a commitment entered into before a "sister agency," FMPA's members are third-party beneficiaries to the 1980 settlement and thus to the license conditions.[30] Moreover, according to FMPA, the Commission should enforce Florida Power's license conditions because to do so would further the competitive objectives of the Energy Policy Act and would give effect to national policy embodied in other statutes that

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[27] 49 FERC P61,116, at p. 61,497 (1989) (PG&E) (finding that nuclear licensing conditions agreed to by Pacific Gas and Electric Company (the "Stanislaus Commitments") were within the Commission's purview).

[28] FMPA Complaint at p. 42.

[29] Id. at pp. 50-51.

[30] Id. at pp. 37-39. FMPA argues that, in fact, the Commission has the authority to directly enforce Florida Power's agreement to abide by the license conditions. Id. at pp. 45-48 (citing, inter alia, United States acting by and through the Western Area Power Administration v. Pacific Gas and Electric Company, 714 F.Supp. 1039, 1051 (N.D. Cal. 1989) (U.S. v. PG&E) (finding that, where the Department of Justice dropped its antitrust investigation of Pacific Gas and Electric Company (PG&E) in exchange for PG&E's agreement to accept the Stanislaus Commitments as conditions attached to its Diablo Canyon nuclear power license, neighboring entities to whom PG&E was obligated to provide transmission services under the Stanislaus Commitments were entitled to sue as third-party beneficiaries of the contract if state law permitted; FMPA Complaint at p. 46); see also U.S. v. PG&E, 714 F.Supp. at pp. 1043, 1047-50, 1053-54.

promote competition beneficial to the public interest.[31] Finally, FMPA argues that the license conditions "must . . . be filed pursuant to FPA § 205(c) since they . . . affect Florida Power's jurisdictional rate schedules."[32]

Also in support of its request for relief under section 206, FMPA argues that the point-to-point restrictions in the existing TSAs are unreasonable "because they prevent efficient coordination and integration among [transmission dependent utilities], unnecessarily increase electricity costs, and impair competition."[33] More specifically, FMPA argues that the rates under the existing TSAs are unduly discriminatory and anticompetitive because FMPA is required to pay a postage stamp rate reflecting a share of the total cost of Florida Power's transmission grid for each receipt and delivery point combination, when Florida Power does not incur such multiple costs to serve its native load customers from multiple resources.[34] FMPA also argues that point-to-point transmission service results in an accumulation of transmission charges such that the price is "many times in excess of the lowest reasonable cost-based rates,"[35] contrary to recent Commission precedent.[36] FMPA also argues that such discrimination gives Florida Power a substantial

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[31] FMPA Complaint at pp. 39-44.

[32] Id. at p. 48.

[33] Id. at p. 52.

[34] Id. at pp. 27-31, 55-61.

[35] Id. at p. 57.

[36] In support, FMPA cites Public Service Company of Colorado, 62 FERC P61,013 (1993), and Public Service Electric & Gas Company, 63 FERC P61,200 (1993), appeal pending, No. 93-1411 (D.C. Cir. filed June 23, 1993).

competitive advantage in bulk power markets, impairs FMPA's ability to compete with Florida Power and deprives new entrants of a competitive market for their generation.[37]

FMPA argues that nothing in the existing TSAs precludes Commission modification or replacement of those agreements. In support, FMPA states that the TSAs contain a "Unilateral Changes and Modifications" clause which expressly reserves to both Florida Power and FMPA the right to request changes to the terms, conditions and charges of the TSA.[38] In any event, FMPA notes, the Commission retains its authority under section 206 of the FPA to replace rates that are contrary to the public interest.[39]

2. FMPA's Application under Sections 211 and 212

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[37] FMPA Complaint at pp. 56, 58, 62-65. FMPA argues that competitive bulk markets can be developed only if transmission dependent utilities have access to transmission systems of the surrounding transmission owners on an equal basis, both in terms of price and quality, as that enjoyed by the transmission owners. Id. at pp. 63-65 (citing, inter alia, Public Service Company of Indiana, Opinion No. 349, 51 FERC P61,367, at p. 62,201, reh'g denied, Opinion No. 349-A, 52 FERC P61,260, order on clarification, 53 FERC P61,131 (1990), appeal dismissed sub nom. Northern Indiana Public Service Company v. FERC, 954 F.2d 736 (D.C. Cir. 1992) (PSI)).

[38] FMPA Complaint at pp. 11-12. FMPA acknowledges that there is a limitation on its claimed section 206 rights in Rate Schedule 109, supra n.9 (which purports to limit until May 1, 1994 the grounds upon which FMPA may unilaterally seek modification), but notes that even this TSA contains two broad exceptions; i.e., that FMPA may apply for a rate change and/or for a superseding or replacement TSA, at any time. Id. at pp. 67-68.

[39] Id. at pp. 66-70.

FMPA states that, although it believes the Commission has "ample authority" to direct Florida Power to provide network transmission service for FMPA's IDO Project (without imposing multiple charges for transmission among multiple points) under section 206,[40] FMPA requests an order requiring network service under sections 211 and 212 of the FPA, as amended by the Energy Policy Act. FMPA argues that such an order would be in the public interest because, inter alia, Florida Power would be required to provide transmission service in accordance with its contractual obligations under the license conditions, consistent with antitrust laws. FMPA also argues that such an order would allow FMPA to integrate its generating resources in an economic and efficient manner and would permit real competition without handicapping Florida Power's competitors.[41]

FMPA argues that it has met the prerequisites under sections 211 and 212 for an order requiring wheeling. FMPA states that it and its members are "electric utilities" and that Florida Power falls within the definition of a "transmitting utility."[42] FMPA also states that it has made a formal request for transmission service more than 60 days prior to filing its application under sections 211 and 212, as required by section 211. Specifically, FMPA explains that it: (1) requested the transmission service in writing on September 8, 1989 and, over the following two years, exchanged

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[40] FMPA Application at p. 70.

[41] Id. at pp. 70-72.

[42] See 16 U.S.C. § 796(22) and (24) (West Supp. 1993) for definitions of "electric utility" and "transmitting utility," respectively.

information and attempted to negotiate with Florida Power; (2) instituted legal proceedings against Florida Power and submitted numerous pleadings requesting network service in the context of that legal action;[43] and (3) submitted another written request to Florida Power for network service on March 25, 1993.[44]

FMPA argues that no reliability issues would be invoked by Florida Power's provision of network service to FMPA's members. FMPA states that although Florida Power has the burden to show that the transmission service ordered would "unreasonably impair the continued reliability of electric systems affected by the order" under section 211(b), Florida Power's actions "make it clear that any reliability argument it now puts forward is a red herring."[45] In support of this assertion, FMPA references, inter alia, Florida Power's March 29, 1993 letter to FMPA, stating that "the dispute in this case is not about service[; t]he existing contracts offer transmission service that would permit FMPA's member Cities, if they choose, to operate their generating resources as a 'network.'"[46] FMPA also references a statement of a Florida Power witness (Florida Power's Manager of Inter-Utility Relations) during negotiations after the 1989 request for network service in which the witness made a counteroffer which: (i) contained terms and conditions that would result in the same physical operation of FMPA's units as FMPA's

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[43] See supra note 11.

[44] FMPA Application at pp. 72-73.

[45] Id. at p. 73.

[46] Id. at p. 74 (citing a letter dated March 29, 1993 of Florida Power's Counsel; see Appendix 35 at p. 1).

proposal; and (ii) could be accommodated as long as FMPA informed Florida Power of the maximum transmission demands at each delivery point.[47] FMPA notes that the Florida Power witness characterized Florida Power's proposed counteroffer as "workable operationally," and thus negated the need for Florida Power personnel to evaluate the impact on Florida Power's system prior to presenting the counteroffer to FMPA.[48] FMPA adds that it has been willing to discuss with Florida Power any legitimate reliability concerns, and remains willing to do so.[49] Finally, FMPA argues that even if Florida Power could demonstrate any impact on the reliability of its transmission system, Florida Power must be held accountable for failing to properly plan its transmission system in a manner that would allow it to reliably meet its obligation to provide network service under the license conditions.[50]

FMPA argues that a Commission order under section 211 requiring network transmission service would not be barred due to any contract or rate schedule under which

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[47] FMPA Application at pp. 74-75 (citing a letter dated April 27, 1990 of William Locke, Jr.; see Appendix 36, Exhibit B; and affidavit dated May 14, 1992 of William Locke, Jr.; see Appendix 47 at pp. 20-23).

[48] FMPA Application at p. 75 (citing a deposition of William Locke, Jr.; see Appendix 9 at pp. 107-11).

[49] FMPA Application at p. 76.

[50] In support, FMPA argues that Article X(c) of the license conditions requires Florida Power to keep neighboring entities informed of its transmission planning and construction programs and to include in those plans transmission capacity sufficient to meet to needs of the neighboring entities, subject to adequate notice by the neighboring entities and contracts to reimburse Florida Power. See Appendix 23 at p. 26.

Florida Power provides power services to FMPA or its members. FMPA states that Florida Power sells partial requirements power to three of its member cities, but states that these contracts do not require Florida Power to provide any energy that FMPA does not schedule. FMPA notes that the rate schedules also specify contract demands and that such demands can be reduced over time. FMPA states that, given that Florida Power is only required to provide FMPA with energy that FMPA chooses to schedule (and, then, within the limits of contract demands specified at that time, which can be reduced over time), it is "extremely unlikely that Section 211(c)(2)(A) will ever come into play -- FMPA would have to seek to use network transmission to replace energy it had already scheduled."[51] Also in support of this argument, FMPA states that it is not a party to any of the rate schedules under which Florida Power provides power services to FMPA's members (FMPA notes that Florida Power insisted on contracting directly with the municipals).[52]

FMPA argues that nothing in the language of section 211 bars the Commission from ordering network transmission service, rather than point-to-point transmission service. To the contrary, FMPA argues that a Commission

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[51] FMPA Application at p. 83; see also id. at pp. 82-84. FMPA argues that this interpretation is consistent with the competitive goals of sections 211 and 212. In addition, FMPA argues that section 211(c)(2)(A) "could never pose a complete or permanent bar to a network transmission order; even assuming (incorrectly) that it could limit FMPA's use of Section 211 transmission, such transmission would be unavailable only during a specified period and for specified purposes." Id. at p. 84 (footnote omitted).

[52] Id. at p. 84 n.83.

order which denied FMPA transmission access on a basis not equal to Florida Power's own access to its transmission system would be inconsistent with the language and "pro-competitive" intent of sections 211 and 212. FMPA argues that the competitive goals of sections 211 and 212 also would be furthered because an order requiring Florida Power to provide network service in this instance would promote efficiencies in transmission and generation markets, thus allowing FMPA to reduce its operating costs by integrating its generation resources.[53]

FMPA suggests several alternative remedies, including that the Commission: (1) require Florida Power to modify the transmission tariffs, if refiled, in Docket No. ER93-465-000 to provide for network transmission service; (2) modify the existing TSAs for transmission service to FMPA's members to provide for network service (or replace them with superseding TSAs with point-to-point limitations removed); and (3) pursuant to the Commission's authority under sections 211 and 212, order Florida Power to provide a new transmission service priced on a different basis than point-to-point service.

Notice of FMPA's complaint and section 211 application was published in the Federal Register,[54] with comments due on or before August 23, 1993.

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[53] Id. at pp. pp. 84-86.

[54] 58 Fed. Reg. 38,123 (1993). Originally, the comment due date was August 9, 1993. On July 22, 1993, Florida Power requested an extension of time until August 23, 1993 to respond to FMPA's complaint. Florida Power stated that FMPA's counsel represented that FMPA did not oppose

B. Florida Power's Response

Florida Power states that although it believes it has "legitimate rights" under the existing TSAs, it is willing to allow the existing TSAs to be superseded by new arrangements established by a final court order under sections 211 and 212 of the FPA.[55] In any event, Florida Power argues, the Commission should reject FMPA's complaint "because the existing TSAs, which FMPA freely executed, cannot be shown to be unjust and unreasonable, a condition precedent to a Section 206 action."[56] Moreover, Florida Power states that section 206 does not permit FMPA to escape its existing contractual obligations because it has decided that it wants different services than it contracted to purchase, and this fact does not change just because Florida Power is subject to NRC license conditions -- particularly license conditions that were already in effect when FMPA negotiated and executed the existing contracts.[57] Florida Power also argues that FMPA's request for an order directing Florida Power to provide network service under section 211 should be rejected because FMPA has not made a proper good faith request, as section 211 requires.

1. Florida Power's Response to FMPA's Section 206 Complaint

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this request. By notice issued July 23, 1993, the Secretary granted this request.

[55] Florida Power Answer at p. 2, 62.

[56] Id. at pp. 2-3.

[57] Id.

Florida Power argues that FMPA's section 206 complaint should be dismissed because: (1) the license conditions do not require Florida Power to provide network service for a single charge; (2) the existing TSAs, which were negotiated after and, therefore, implement the license conditions, were entered into willingly by FMPA as deliberate business decisions; (3) section 206 does not permit FMPA to reform the existing TSAs merely because it has since embarked on the IDO Project and decided, after the fact, that it no longer wishes to purchase the services it contracted for; (4) the TSAs are just and reasonable for the services they were designed to provide, and in fact offer FMPA considerable flexibility to coordinate its members' loads and resources and to take full advantage of dispatch efficiencies; and (5) the TSAs are not unduly discriminatory and have caused FMPA no competitive injury.

With respect to the license conditions, Florida Power argues that the "between . . . or among" language upon which FMPA relies is not NRC boilerplate, does not have one uniform meaning in all of the various NRC license conditions in which it is found, and does not require network service at a single charge. In Florida Power's view, that language merely requires it to deliver power between or among several systems -- which Florida Power does under the existing TSAs.[58] In fact, according to Florida Power, the Louisiana Power license conditions upon which FMPA relies, which contain "between . . . or among" language, also contain a separate sentence, absent from Florida Power's license

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[58] Id. at pp. 42-44.

conditions, which expressly requires that there be a single charge for transmission among coordinating groups. As a result, Florida Power contends that: (1) the NRC recognized that "among," by itself, did not convey the concept of a single transmission charge; and (2) the negotiators of FPL's license conditions, who FMPA itself states knew and understood the precedent concerning the wording of Louisiana Power's license conditions, deliberately omitted the "single charge" language from Florida Power's license conditions because they did not intend to follow this aspect of the Louisiana Power decision.[59] For all of these reasons, Florida Power contends that the license conditions do not require network service at a single charge, and that FMPA's contrary claims must be rejected.

With respect to the TSAs, Florida Power states that they were negotiated by competent and experienced utility personnel and counsel for each side, were the product of give and take, and implemented the license conditions by means which were acceptable (if not optimal) to both parties. As a result, FMPA made a conscious "business decision" to sign the TSAs, rather than attempt to seek recourse under the license conditions before the NRC or this Commission.[60] Indeed, Florida Power notes that on deposition in the pending federal district court litigation, FMPA acknowledged having made a calculated determination that it was more advantageous to accept the benefits of Florida Power's service agreements than to litigate,[61] given that in the

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[59] Id. at pp. 10-11, 44-47; see also supra note 22.
[60] Id. at pp. 20-22; see also FMPA Complaint at pp. 10-11.
[61] Florida Power Answer at pp. 20-22 and Tabs G, D.

compromises ironed out by the negotiators, FMPA "obtained as least as much in concessions from Florida Power"[62] as it would have achieved if it had sought to enforce the license conditions or had required Florida Power to file an unsigned contract unilaterally with this Commission.[63] Further, Florida Power contends that FMPA's central problem with the existing TSAs is not that their terms and conditions are unjust and unreasonable, but rather that FMPA simply wants different services than those which the TSAs were designed to provide, now that FMPA has embarked on the IDO Project, which completely revamps FMPA's transmission arrangements.[64] According to Florida Power, however, the fact that FMPA no longer wishes to purchase the services it contracted for in the TSAs does not make the TSAs unjust and unreasonable for the purposes for which they were intended, and does not permit FMPA to evade its contractual obligations under them.[65]

In addition, Florida Power contends that the TSAs are just and reasonable for the services they were designed to provide, and in fact offer FMPA considerable flexibility to coordinate its members' loads and resources and to take full advantage of dispatch efficiencies. In support of its assertion, Florida Power notes that its All-Requirements Transmission

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[62] Id. at p. 40.
[63] Id. at p. 21.
[64] Id. at p. 17.
[65] Id. at pp. 3, 18.

Service Agreement[66] with FMPA, which terminates in the year 2022, permits FMPA to: (1) integrate existing and future generation entitlements and loads of the applicable members and to incorporate those members' generation and loads into the Orlando Utilities Commission control area; (2) replace its existing resources with lower cost generation on an hourly basis, at no additional charge; (3) substitute new generation for existing generation on ninety days' notice without additional charge; (4) add new generating resources to meet load growth; (5) designate certain resources for peaking use and to vary transmission payments for those generators on a monthly basis; (6) redesignate contract demands associated with its peaking resources from year to year; (7) use its interchange agreements with other utilities to buy and sell capacity and energy on behalf of the All- Requirements cities; and (8) obligate Florida Power to provide transmission service for any excess demand on the system.[67] Further, Florida Power notes that its St. Lucie Delivery Service Agreement,[68] Stanton Transmission Service Agreement,[69]

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[66] All-Requirements Transmission Service Agreement, FERC Electric Rate Schedule No. 84, as amended by the Restated and Revised Transmission Service Agreement, FERC Electric Rate Schedule No. 109.

[67] Florida Power Answer at pp. 12-14.

[68] FERC Electric Rate Schedule No. 72. The St. Lucie Delivery Service Agreement terminates on the earlier of the final retirement of the St. Lucie Units No. 1 and 2 or the latest stated maturity date of any of the original bonds issued by FMPA to finance its ownership interest in Unit No. 2. But see 18 C.F.R. § 35.15 (1993).

[69] FERC Electric Rate Schedule No. 92 (Nov. 25, 1986). The Stanton Transmission Service Agreement terminates on the earlier of Stanton Unit No. 1's retirement or December 31, 2022. But see 18 C.F.R. § 35.15 (1993).

Stanton Tri-City Transmission Service Agreement,[70] and Agreement to Provide Specified Transmission Service[71] all provide FMPA additional flexibility to redesignate delivery points, obtain replacement transmission service when its generating entitlements are wholly or partially unavailable, change its contract demand, and engage in transactions which enable FMPA to achieve hour-to-hour dispatch efficiencies.[72] For all these reasons, Florida Power contends that FMPA is plainly wrong in asserting that Florida Power provides it nothing but inflexible, point-to-point service.[73]

Moreover, given the flexibility that Florida Power sees in the TSAs, Florida Power views the instant dispute as one involving price, not service, since, according to Florida Power, the existing contracts offer transmission service that would permit FMPA's member cities to operate their generating resources as a network.[74] Indeed, Florida Power contends that what FMPA actually seeks here is: (1) the ability to purchase transmission service on an hourly basis, without limitation; (2) the unfettered right to first priority use

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[70] FERC Electric Rate Schedule No. 93 (Nov. 25, 1986). The Stanton Tri-City Transmission Service Agreement terminates on the earlier of Stanton Unit No. 1's retirement or December 31, 2022. But see 18 C.F.R. § 35.15 (1993).

[71] FERC Electric Rate Schedule No. 86 (Apr. 24, 1986). The Agreement to Provide Specified Transmission Services has a perpetual term subject to a two-year cancellation notice provision.

[72] Florida Power Answer at pp. 14-16.

[73] Id. at pp. 12-14.

[74] See Florida Power's Third Motion for Summary Judgment and counsel for Florida Power's March 29, 1993 letter to counsel for FMPA, attached as Appendices 46 and 35 to FMPA's Complaint.

of Florida Power's transmission system (even above Florida Power); and (3) the ability to dispatch its resources at will, all with no reservation charges for firm capacity.[75] In fact, according to Florida Power, FMPA's own feasibility studies for the IDO Project show that unless FMPA is able to buy transmission service to integrate its generation and load without payment of any reservation charges -- i.e., buy firm service priced as hourly non-firm service -- the IDO Project does not produce economic benefits.[76] For all of these reasons, Florida Power reiterates that FMPA is merely seeking to "toss aside existing contracts because FMPA now wishes to pursue an IDO Project that FMPA believes is not compatible with the contracts it negotiated and signed before the IDO Project was created."[77] Florida Power argues, however, that "section 206 does not provide a mechanism for purchasers to escape their contractual obligations because they are no longer happy with the economic consequences of their contracts."[78] For these reasons as well, Florida Power

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[75] Florida Power Answer at pp. 24-25 and 50, n.57. In this context, Florida Power also argues (citing Otter Tail Power Company v. United States, 410 U.S. 366, 375 (1973); Richmond Power & Light Company v. FERC, 574 F.2d 610 (D.C. Cir. 1978); New York State Electric & Gas Corporation v. FERC, 638 F.2d 388 (2d Cir. 1980), cert. denied, 454 U.S. 821 (1981); and Florida Power & Light Company v. FERC, 660 F.2d 668, 673 (5th Cir. 1981), cert. denied, 459 U.S. 1156 (1983)) that the Commission lacks authority under section 206 to take Florida Power's existing transmission service and transform it into a different or additional service. Florida Power Answer at pp. 55-58.

[76] Id. at pp. 24-26.

[77] Id. at p. 34.

[78] Id. at p. 31.

contends that FMPA's section 206 complaint must be rejected.

With respect to FMPA's discrimination and competition claims, Florida Power argues that the Commission has uniformly held, under circumstances quite similar to those present here, that point-to-point transmission pricing is not unjust, unreasonable or unduly discriminatory.[79] Moreover, Florida Power contends that no plausible argument can be made that it gained a competitive advantage under the existing TSAs. Indeed, according to Florida Power, in the last ten years, FMPA has successfully implemented the All-Requirements Project, the Stanton Project, the Tri-City Project and the St. Lucie Project, and as a result of these projects, Florida Power's share of energy sales to FMPA's members in Florida Power's service territory has declined from approximately 50 percent in 1981 to less than 15 percent. According to Florida Power, these facts show that FMPA has been able to compete very effectively with Florida Power.[80] For these reasons as well, Florida Power urges that FMPA's section 206 complaint be rejected.

Finally, Florida Power argues that it need not file the license conditions with the Commission, since: (1) the existing TSAs govern Florida Power's transactions with FMPA and its members, not the license conditions; and (2)

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[79] Id. at pp. 51-55 (citing Wisconsin Electric Power Company, 46 FERC P61,109, reh'g denied, 48 FERC P61,247 (1989); PSI, supra; Entergy Services, Inc., 63 FERC P61,205, at p. 61,147 (1993); and Northeast Utilities Service Company, 62 FERC P61,294 (1993)).

[80] Id. at pp. 22-23, 50.

FMPA has attached a copy of the license conditions to its complaint.[81]

2. Florida Power's Response to FMPA's Application Under Sections 211 and 212

With respect to the application under sections 211 and 212, Florida Power states that it has consistently been and remains Florida Power's position that it will negotiate to replace the existing TSAs with a single agreement providing comprehensively a "form of 'network' service" so long as (1) Florida Power's system reliability is not jeopardized; (2) Florida Power receives fair compensation and its other customers do not subsidize FMPA; and (3) the arrangement allows Florida Power to prudently plan and operate its transmission system.[82] Florida Power states that because it believes sections 211 and 212 provide a process for establishing rates, terms and conditions of transmission service for FMPA that are consistent with such objectives, Florida Power will respond to a specific good faith request for network service and will provide service pursuant to sections 211 and 212.

Florida Power argues that FMPA's application for wheeling under section 211 raises three threshold issues: (1) whether transmission service ordered under section 211 includes network service, and how network service should be defined; (2) whether section 211 can be used to override existing valid contracts for transmission service; and (3) what are the minimum components of a good faith request for

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[81] Id. at pp. 58-61.
[82] Id. at p. 2.

transmission service and whether FMPA has met those standards.[83]

With respect to the first issue, Florida Power states that it does not contest the Commission's determination in its policy statement concerning good faith requests that section 211 encompasses requests for "'network' type transmission services."[84] Florida Power states that the issues that remain to be decided under sections 211 and 212, assuming Florida Power and FMPA are unable to agree, are what constitute the rates, terms and conditions of "a 'network' type service" that meet the reliability and public interest standards of section 211, and the rate standards of section 212.[85]

With respect to the second issue, as discussed above,[86] Florida Power maintains that it has rights under its existing TSAs and states that it does not believe that section 211 overrides existing transmission service agreements. However, Florida Power argues that its willingness to allow the existing TSAs to be superseded by new arrangements established pursuant to sections 211 and 212 should moot the need for the Commission to act on FMPA's complaint.[87]

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[83] Id. at p. 61.
[84] Id. at p. 62.
[85] Id.
[86] See supra note 55.
[87] Florida Power Answer at pp. 2, 5, 62. While Florida Power's answer is not entirely clear, id. at p. 5, it appears that Florida Power may be willing to voluntarily agree to supersede the existing TSAs with the transmission services ordered by the Commission under sections 211 and 212. Accordingly, we intend to hold Docket No. EL93-51-000 in abeyance pending the outcome here.

With respect to the third issue, Florida Power states that, although it is prepared to provide expanded transmission services to FMPA pursuant to an order under sections 211 and 212, Florida Power does not believe FMPA's request for transmission service satisfies the minimum requirements of a good faith request that is a prerequisite to the exercise of the Commission's authority under sections 211 and 212.[88] Therefore, Florida Power argues, FMPA's section 211 request should be rejected at this time. In support of this argument, Florida Power alleges that FMPA has presented different versions of its IDO Project to Florida Power and has been consistently vague about the parameters of the service it desires.[89] Florida Power also alleges that, to date, FMPA has not been willing to provide much of the critical information Florida Power needs in order to evaluate and respond to FMPA's request for network transmission service, and, thus, has presented Florida Power with a "moving target."[90] Specifically, Florida Power states that it requires the following information:

(1) A designation of each municipal system to be covered by the requested service and ten-year projections of peak loads served by each delivery point for the relevant municipals.

(2) A designation of each FMPA generating resource that FMPA will or may utilize to serve the loads in the municipal systems described in (1) above, and the maximum

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[88] Id. at pp. 61, 63-67.
[89] Id. at pp. 3-4.
[90] Id. at p. 5.

quantity of power available to FMPA from each such resource, as well as the information set forth in a questionnaire attached to Florida Power's answer (which asks for information concerning heat rate, fuel type, maintenance schedules, real and reactive power capabilities of each unit and interchange schedules for each participating member by existing and future contract, expected interchange and maximum and minimum imports).[91]

(3) A designation of all planned or projected FMPA generating resource additions (and/or substitutions) for the next ten years, the size and location of each resource, and the characteristics of each resource (e.g., baseload, intermediate and peaking); additionally, the information requested in (2) above for such planned resources (to the extent it is available).

(4) Any studies or other data showing FMPA's anticipated dispatch, or use of, existing and planned generating resources, including anticipated retirements or long- term shutdown options; additionally, any studies or other data showing the impact of FMPA's proposal on Florida Power's transmission system.

(5) A model of each participating FMPA member's transmission system in a specified computer format with information concerning transmission line impedances, compensation devices, auto transformers and load projections and power factor (leading and lagging) for each substation.[92]

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[91] See Attachment 2 to Florida Power Answer at pp. 1-8.
[92] Id. at pp. 4-5.

Finally, Florida Power requests that the Commission require FMPA "to state whether it has a bona fide transaction in mind to which it is prepared to commit in lieu of the Existing TSAs,"[93] because if FMPA is not willing to abide by the Commission's determination under section 211, or may change its plans about implementing the IDO Project, "the Commission should have the ability to consider whether FMPA has made a bona fide, good faith request for transmission service that warrants the initiation of a proceeding under Section 211."[94] In support of this request, Florida Power states that, in the past, FMPA typically has "played cat and mouse" with Florida Power;[95] that is, FMPA would request a particular transmission service of Florida Power, negotiate and enter into an agreement with Florida Power, and then change its mind about going forward with the project that was the subject of the agreement at issue. Florida Power argues that, to the extent FMPA has a specific project in mind for which it desires network service, FMPA should provide information in sufficient detail to enable Florida Power to develop a transmission service proposal which will fairly compensate Florida Power. Florida Power states that if FMPA is dissatisfied with Florida Power's proposal, it can at that time file a request for an order under section 211.[96]

C. FMPA's Response to Florida Power's Answer

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[93] Id. at p. 5.
[94] Id. at p. 6.
[95] Id. at p. 66.
[96] Id. at pp. 5-6, 66-67.

On September 9, 1993, FMPA filed a motion for leave to file opposition to Florida Power's answer two days out of time and, separately, a response to Florida Power's answer. FMPA explains that it was unable to meet the September 7, 1993 deadline "due to the scope of the tasks involved in preparing" its response to Florida Power's answer (including the preparation of an affidavit and supporting materials), as well as pleadings in Florida Power's "open access" transmission tariff filing (Docket No. ER93-465-000) and in the federal district court action.[97]

In its response to Florida Power's arguments regarding FMPA's request for relief under section 206, FMPA reiterates its arguments that, inter alia, Florida Power is obligated to provide network transmission service under the license conditions and, therefore, is evading its contractual obligations by failing to file with the Commission a transmission agreement that will implement this obligation.[98] In addition, in responding to Florida Power's argument that FMPA has effectively waived the right to enforce the license conditions, FMPA argues that it "did not agree to any waiver or extinguishment of its Antitrust Condition rights to network transmission."[99] In support, FMPA argues, among other things, that "the TSAs cannot have been intended to replace the Antitrust Conditions because they do not purport (either as a group or individually) to set forth the totality of the transmission

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[97] FMPA Motion for Leave to File Out of Time at p. 2; see supra note 11.
[98] FMPA Response at pp. 2, 19-21.
[99] Id. at p. 22.

Florida Power is obligated to sell to FMPA."[100] Also in support, FMPA rejects Florida Power's argument that the existing TSAs do not contain broad waiver clauses that provide a basis for the modification or replacement of the existing TSAs.[101]

In response to Florida Power's stated willingness to allow the existing TSAs to be superseded by new arrangements that will provide some form of network service under sections 211 and 212,[102] FMPA notes that Florida Power has not yet filed any such arrangement and argues that, yet again, Florida Power is evading its obligations to provide network transmission on behalf of FMPA's members.[103] FMPA urges the Commission to recognize Florida Power's assertion that it has consistently been willing to negotiate a form of network service "for what it is -- a sham designed to evade FERC jurisdiction and further delay provision of network service."[104] FMPA reiterates that it and

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[100] Id. at p. 24 (footnote omitted); see also id. at p. 33.

[101] Id. at pp. 25-26, 29-31. In support, FMPA argues, inter alia, that Florida Power's reliance on U.S. v. PG&E is misplaced because Florida Power "ignores the [U.S. v. PG&E] court's primary holding that to the extent PG&E's requirements contracts provided for service modifications (through alternate power clauses), PG&E had been obligated to make such modifications to implement its license conditions." Id. at p. 29. FMPA argues that certain clauses in the existing TSAs, like the alternate power clauses in U.S. v. PG&E, "provide "escape clausess" requiring [Florida Power] to agree to service modifications that implement the Antitrust Conditions." Id. at pp. 29-30 (citing U.S. v. PG&E, 714 F.Supp. at p. 1052).

[102] See supra notes 55, 82.

[103] FMPA Response at pp. 2-10.

[104] Id. at p. 4 (citing Florida Power Answer at p. 2).

its member cities have repeatedly requested network service since the license conditions became effective, and that Florida Power has consistently refused.[105] FMPA argues that, rather than accept Florida Power's "transparent evasive maneuver and invitation to further interminable delay,"[106] the Commission should hold Florida Power to its offer to provide such service and summarily direct Florida Power to file a transmission tariff or rate schedule for network service. FMPA states that, once Florida Power makes such a filing, the Commission can focus on "the real issue for decision by

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[105] FMPA Response at pp. 19, 31-32. In support, FMPA provides, as an attachment to its Response, an affidavit of its consultant who participated in negotiations with Florida Power. The consultant states that, on September 8, 1989, FMPA formalized its previous informal discussions with Florida Power with respect to the IDO Project. The consultant also states that the written request, which included FMPA's proposed rate schedule, was followed by months of meetings, several Florida Power requests for information to enable Florida Power to study the proposal, and FMPA's responses to those requests providing the detailed information requested and offering to provide more if needed. FMPA states that the consultant's affidavit shows that "despite months of study and meetings, and numerous significant concessions by FMPA in an attempt to be responsive to [Florida Power's] concerns, [Florida Power] never, in two years of negotiations, budged from its refusal to sell network service." Id. at p. 7 (citing Affidavit of Albert Malmsjo; see Appendix A to FMPA Response at pp. 4-11). Also in support, FMPA submits a Florida Power motion filed in the federal district court proceeding in which Florida Power argued that FMPA cannot claim that it was ever led to believe that Florida Power would provide network service because, for more than five years prior to the filing of FMPA's complaint in the district court, "FPL's responses to requests for network service were not merely 'no,' but 'hell no.'" See Attachment 4 to FMPA Response at p. 10.

[106] FMPA Response at p. 5.

this Commission: the rates, terms and conditions for network service."[107]

FMPA also argues that Florida Power's claim that FMPA has not provided sufficient information upon which to analyze FMPA's request for network service is "preposterous,"[108] and "reflects at best a sudden case of amnesia."[109] In support, FMPA states that it has provided: detailed information over the two years of negotiations (following FMPA's formal request for network service in 1989); the studies Florida Power performed concerning the impact of the IDO Project on Florida Power's transmission system; and "enormous amounts of information" in connection with the pending court case.[110] Moreover, according to FMPA, Florida Power's own documents, affidavits and depositions "demonstrate . . . that [Florida Power] knew precisely what FMPA was requesting and could analyze that request to death."[111] FMPA argues that there is no merit to Florida Power's contention that FMPA constantly changed its proposal and thus presented a "moving target," because any changes to FMPA's proposal reflect FMPA's efforts to respond to Florida Power's concerns in order to reach mutually agreeable terms and conditions.[112]

Finally, FMPA states that it has provided or offered to provide all of the information which Florida Power now

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[107] Id. at p. 6.
[108] Id. at p. 10.
[109] Id.
[110] Id.
[111] Id.
[112] Id. at pp. 12, 16-17; see supra note 90.

claims it requires to evaluate FMPA's request for network service. Specifically, according to FMPA, between 1989 and 1991, the following information exchanges occurred:

(1) in a September 8, 1989 letter to Florida Power, FMPA submitted a detailed proposed contract which contained, among other things, a list of the specific systems involved, provisions for identifying specific resources to be transmitted, provisions for adding new resources, provisions for identifying specific delivery points, and provisions for adding new system delivery points;

(2) at an October 13, 1989 meeting, Florida Power stated that it would evaluate FMPA's proposal using the Florida Coordinating Group (FCG) transmission model and data base, and requested additional data needed to perform the analysis;

(3) in a November 2, 1989 letter to Florida Power, FMPA provided the information requested in (2) above, for all IDO systems interconnected to Florida Power, including: projected monthly loads for 1990; projected seasonal peak and energy requirements for ten years beginning in 1990; a list of and information on the specific generating units and resources to be transmitted (including name, location, type of unit, fuel type, in-service date, retirement date, summer and winter net capability, and method of fuel transportation); information on resources expected to be used for the next ten years; projected loads on Florida Power system interconnections for ten years (including normal conditions, largest internal generating unit out, all internal resources off line and all internal resources on line at full output during

minimum loading conditions); and projected operation of each resource during summer and winter peak hours for next ten years;

(4) in November, 1989, FMPA received a telephone call from Florida Power asking for more information;

(5) in a November 14, 1989 letter to Florida Power, FMPA provided the information requested by Florida Power in (4) above, including: projected monthly loads for the IDO systems not interconnected with Florida Power (West System); projected West System summer and winter peak demands for the next ten years; information on the generating units expected to be used to meet West system loads and reserve requirements in the same detail as already provided for internal resources; and heat rate information on each internal and West System resource;

(6) in November or December, 1989, FMPA received a telephone call from Florida Power asking that load data be provided for each individual West System;

(7) in a December 14, 1989 letter to Florida Power, FMPA provided the requested information and told Florida Power to let FMPA know if Florida Power needed any additional information;

(8) in a January 22, 1990 meeting, Florida Power presented the first version of its study document "Impact of Proposed FMPA Integrated Dispatch Arrangement on [the Florida Power] Transmission System." Florida Power explained the document (which showed dispatch of IDO resources, IDO system loads, and impacts on Florida Power

transmission constraints under various conditions), and stated that additional work was needed, including an analysis of local transmission impacts;

(9) in a February 21, 1990 meeting, Florida Power provided a revised draft of the study presented January 22, 1990 and a draft report entitled "Impact of Proposed FMPA Integrated Dispatch on [Florida Power] Regional Transmission Facilities, Preliminary Findings." The meeting focused on FMPA's exception to certain assumptions underlying the analysis. Florida Power stated that to finalize the studies it would need to determine modifications that would be needed to Florida Power's transmission system to eliminate any possible impacts of the IDO arrangement, and Florida Power also stated that it would start on this process; and

(10) in February, 1993, FMPA gave Florida Power its consultant's analysis of economic damages that FMPA has incurred due to its inability to implement the IDO, including details of the production cost model which simulates the operation of the IDO Project had it been in place between 1988 through 2006 (i.e., a summary of the results, 23 hard-copy volumes of backup data, and some of the calculations and data in electronic form), and offered to furnish hourly data for any period Florida Power specified. Florida Power never requested the hourly data.[113]

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[113] See Affidavit of Albert Malmsjo, Appendix A to FMPA Response at pp. 5-10.

FMPA concludes that "there is simply nothing to [Florida Power's] claim that it has lacked the information necessary to understand and analyze FMPA's requests."[114]

FMPA also argues that, since FMPA has made an adequate good faith request more than 60 days before filing its application (in this proceeding), thus providing Florida Power with a "full opportunity" to study FMPA's request, "no purpose consistent with the [Energy Policy] Act would be served by imposing an additional "waiting period" before addressing the merits."[115]

D. Motions to Intervene and Additional Pleadings

On August 9, 1993, the American Public Power Association (APPA) filed a motion to intervene. APPA requests intervention, despite the fact that it would not be directly affected by the outcome of this proceeding, because of the possible precedential effect of this case. In support of its request, APPA states that its members include utilities that own transmission facilities as well as transmission-dependent utilities, and that APPA was an active participant in the

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[114] FMPA Response at p. 15.

[115] Id. at p. 18. FMPA concedes that some of the data may need to be updated. FMPA argues that, even if this is the case, to force FMPA to "go back to 'square one,' as [Florida Power] urges" would be inconsistent with the goal of the Energy Policy Act. Id. at pp. 18-19 n.27.
As discussed below, we are affording FMPA and Florida Power a period of 60 days to negotiate the rates, terms and conditions of the network transmission services we are ordering. FMPA shall update the data previously provided to Florida Power within 15 days of the date of this order.

debate over the transmission access provisions of the Energy Policy Act.[116]

On August 9, 1993, Tampa Electric Company (Tampa) filed a motion to intervene.[117] Tampa states that it would be directly affected by the outcome of this proceeding because it is directly interconnected with Florida Power and purchases transmission services from Florida Power.

On August 9, 1993, Texas Utilities Electric Company (Texas Utilities) filed a motion to intervene.[118] Texas Utilities acknowledges that it will not be directly affected by the outcome of this proceeding, but requests that it be allowed to intervene because "the Commission has yet to issue any order requiring transmission services pursuant to Section 211, [and] the Commission's disposition of the issues in this proceeding may have significant precedential effect . . binding on all transmitting utilities."[119]

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[116] Also in support of its request, APPA cites, inter alia, Indiana Michigan Power Company and Ohio Power Company, 64 FERC P61,184, at p. 62,552 (1993) (Indiana Michigan).

[117] Tampa is a public utility, organized and existing in the State of Florida, which sells electric power at wholesale.

[118] Texas Utilities is engaged in the generation, transmission, distribution, purchase and sale of electric energy and serves approximately one-third of the State of Texas. Texas Utilities is not interconnected with either FMPA or Florida Power.

[119] Texas Utilities Motion to Intervene at p. 2. In support, Texas Utilities cites Indiana Michigan.

Texas Utilities is correct that the Commission has not yet ordered transmission under section 211, as amended by the Energy Policy Act. However, as Texas Utilities is fully aware, the Commission did order transmission under the pre- Energy Policy Act version of section 211. See

On August 23, 1993, Duke Power Company (Duke) filed a motion to intervene.[120] Duke requests that the Commission allow Duke to intervene because of the possible precedential effect of this case.[121]

On August 23, 1993, LG&E Power Systems, Inc. (LG&E) filed a motion to intervene.[122] LG&E argues that the Commission should allow it to intervene because this case "will affect power development and access to power purchase markets across the country."[123]

On August 23, 1993, Seminole Electric Cooperative, Inc. (Seminole) filed a motion to intervene.[124] Seminole states that it has a direct interest in this proceeding because it purchases full and partial requirements power from Florida Power, and because Seminole is dependent upon Florida Power for the transmission to serve Seminole's loads located in the Florida Power control area.

Central Power and Light Company, et al., 17 FERC P61,078 (1981), order on reh'g, 18 FERC P61,100 (1982).

[120] Duke is a public utility which provides retail and wholesale electric services in portions of North Carolina and South Carolina.

[121] In support of this request, Duke cites Indiana Michigan and Tex-La Electric Cooperative of Texas, Inc., 64 FERC P61,162 (1993) (Tex-La).

[122] LG&E is a power developer engaged in developing, owning and operating power projects.

[123] LG&E Motion to Intervene at p. 3.

[124] Seminole supplies wholesale electric power and energy on behalf of its eleven members which serve retail customers in 45 counties in Florida. Seminole states that, on August 20, 1993, it sent a formal written request to Florida Power for limited transmission service to commence in 1999, pursuant to sections 211 and 212 of the FPA and the license conditions. Seminole Motion to Intervene at p. 4.

On August 24, 1993, FMPA filed an answer in opposition to Texas Utilities' motion to intervene. FMPA argues that Texas Utilities' request for intervention should be denied, because: (1) the Commission can decide this case on the basis of section 206, rather than sections 211 and 212, and that the only justification for Texas Utilities' intervention would be the precedential effect of a section 211 case; and (2) Texas Utilities acknowledges that it has no direct interest in the case.

On August 24, 1993, Florida Power filed an answer in opposition to APPA's motion to intervene. Florida Power argues that APPA has no direct interest which warrants APPA's intervention. Florida Power also argues that the cases APPA cites in support of its request to intervene present unique circumstances that are not present here.[125]

On August 27, 1993, FMPA filed an answer in opposition to Duke's motion to intervene. FMPA states that it opposes Duke's motion because, among other reasons, Duke is an investor-owned public utility (IOU) whose views are adequately represented by Florida Power and other intervening IOUs.

On September 21, 1993, Florida Power filed a letter arguing that FMPA's response to Florida Power's answer

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[125] See supra note 116. More specifically, Florida Power argues, inter alia, that in Indiana Michigan, that proceeding was the only forum in which other utilities could express their views on the primary issue in that case (i.e., compensation for "loop flows"); here, however, generic proceedings exist in which entities such as APPA can express their concerns regarding the Commission's transmission policy. Florida Power Answer to APPA Motion to Intervene at pp. 2-3.

should be rejected. Florida Power argues that, although in the past the Commission has occasionally permitted responsive pleadings in unusual circumstances, no such circumstances are present here since FMPA merely reiterates arguments made in its earlier pleading.

II. Discussion

A. Interventions and Additional Pleadings

Under Rule 214 of the Commission's Rules of Practice and Procedure,[126] the timely, unopposed motions to intervene filed by Tampa, LG&E and Seminole serve to make them parties to this proceeding.

The timely motions to intervene by Duke and Texas Utilities are opposed by FMPA, and the timely motion to intervene by APPA is opposed by Florida Power. Normally, under our Rules of Practice and Procedure, a would-be intervenor must demonstrate that it has or represents an interest that may be affected by the outcome of the proceeding or that its participation otherwise is in the public interest.[127] Generally, an interest that is based solely on the possible precedential effect of the Commission's decision in a particular proceeding does not constitute a sufficiently direct interest to warrant intervenor status in that proceeding.[128]

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[126] 18 C.F.R. § 385.214(c)(1) (1993).

[127] 18 C.F.R. § 385.214(b)(2) (1993).

[128] See, e.g., Northeast Utilities Service Company, 53 FERC P61,135, at p. 61,456 (1990); Panhandle Eastern Pipe Line Company, Opinion No. 313-A, 46 FERC P61,189, at pp. 61,630- 31 (1989); New England Power Company, 37 FERC P61,078, at pp. 61,196-97 (1986); Virginia Electric and Power Company, 27 FERC P61,093, at pp. 61,181-82 (1984);

However, given that we have not yet addressed a request for transmission service under sections 211 and 212 (as amended by the Energy Policy Act) on the merits, much less a request for network transmission service, we are sensitive to the concern, articulated in several motions to intervene, that our order in this proceeding could have the effect of establishing binding precedent on broad issues affecting the entire industry.[129] Accordingly, in these circumstances, we find that it is in the public interest to grant all of the contested interventions.

Notwithstanding that Rule 213 of the Commission's Rules of Practice and Procedure generally prohibits the filing of an answer to an answer, we will accept FMPA's September 9, 1993 response to Florida Power's answer since we find, given the complexity of the issues presented, this pleading has aided us in understanding the parties' positions.

B. FMPA's Section 211 Application

This is the first case in which the Commission proposes to order transmission services under section 211 of the FPA, and the first proposed order we have issued under section 212(c)(1), since sections 211 and 212 were amended by the Energy Policy Act. We note that section 212(c)(1) does not provide a standard upon which the Commission should base a decision to issue a proposed order, nor does it

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Kansas-Nebraska Natural Gas Company, 21 FERC P61,285, at pp. 61,781-82 (1982).

[129] See, e.g., APPA Motion to Intervene at pp. 2-4; Duke Motion to Intervene at pp. 4-6; LG&E Motion to Intervene at p. 3; Texas Utilities Motion to Intervene at p. 4.

dictate the contents of a proposed order. Consequently, the Congress left it to the Commission's discretion to define the threshold for the issuance of a proposed order, and the contents of a proposed order.

The Commission believes it has considerable discretion with respect to both the timing and specificity of a proposed order issued under section 212(c)(1). Clearly, any final order for transmission services must meet all the prerequisites of sections 211 and 212, including a finding that the order meets the requirements of section 212, and would otherwise be in the public interest. In addition, the Commission may not issue an order if it finds the order would unreasonably impair the continued reliability of electric systems affected by the order. However, the statute does not state that preliminary findings or determinations must be made in the proposed order regarding each of the prerequisites to a final order. We believe it is in our discretion, in issuing a proposed order, to reserve judgment on some or all of the prerequisites of a final order, depending upon the facts before us.

We conclude that there is a sufficient record before us to exercise our authority to issue a proposed order. At this early stage of our implementation of the amended sections 211 and 212, and based on the facts of this particular case, we have chosen in this proposed order to make preliminary determinations regarding the public interest and reliability, and to provide general pricing guidance, but to give the parties the opportunity to negotiate specific rates, terms and

conditions of service consistent with section 212(a)[130] and our transmission pricing policies. In taking this approach, we hope to provide sufficient guidance to advance the negotiations between the parties to the proposed order (Florida Power and FMPA).[131]

FMPA has requested network transmission service under which Florida Power would transmit power without assessing multiple charges for each receipt/delivery point combination. Florida Power has indicated its willingness to negotiate network service. For the reasons discussed below, we propose to issue an order requiring Florida Power to provide network transmission service to support FMPA's

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[130] Before issuing a final order, section 212(a) requires that we find that the rates, charges, terms and conditions of the service to be provided:
permit the recovery . . . of all the costs incurred in connection with the transmission services and necessary associated services, including, but not limited to, an appropriate share, if any, of legitimate, verifiable and economic costs, including taking into account any benefits to the transmission system of providing the transmission service, and the costs of enlargement of transmission facilities. Such rates, charges, terms and conditions shall promote the economically efficient transmission and generation of electricity and shall be just and reasonable, and not unduly discriminatory or preferential. Rates, charges, terms and conditions for transmission services provided pursuant to an order under section 211 shall ensure that, to the extent practicable, costs incurred in providing the wholesale transmission services, and properly allocable to the provision of such services, are recovered from the applicant for such order and not from a transmitting utility's existing wholesale, retail, and transmission customers.

[131] Accordingly, as discussed below, we have made a preliminary judgment regarding general pricing under section 212(a) (i.e., no multiple point pricing), but we reserve judgment on specific rates, terms and conditions.

IDO project, without multiple point-to-point pricing and consistent with section 212(a). In doing so, on a preliminary basis, we reject multiple point-to-point charges for network service in this case.

The Commission recognizes that the cost of providing network service may exceed the cost of point-to-point service because the transmitting utility may incur additional transmission capacity costs to accommodate the increased flexibility of network usage of the system. The extent of any additional costs associated with network service is at the core of the negotiations we are initiating under this order. In developing rates for the service, Florida Power must substantiate its costs of providing network service. If Florida Power seeks to charge a rate for network service that exceeds what it charges for point-to-point service, it must provide the information necessary for us to determine that such a charge is justified. Florida Power's rates, charges, terms and conditions for this network service must not be unduly discriminatory when compared to rates, charges, terms and conditions of transmission used to serve Florida Power's other customers, and must meet the other requirements of section 212(a).

Consistent with section 212(c)(1) of the FPA, we will give FMPA and Florida Power 60 days to agree to the specific rates, terms and conditions under which this order is to be carried out, including the apportionment of costs between them and the compensation or reimbursement due to either of them.

Pursuant to section 212(c)(1), this proposed order shall not be reviewable or enforceable in any court. In addition, we clarify that, consistent with 18 C.F.R. § 385.713, this is an interlocutory order not subject to requests for rehearing. The proper time for parties to seek rehearing is after the Commission issues a final order under section 211.

1. The Threshold Question: The Impact of Preexisting Agreements

As an initial matter, we address the issue of whether the Commission is barred, in whole or in part, by section 211(c)(2) of the FPA from requiring Florida Power to provide the transmission service requested by FMPA. Section 211(c)(2) prohibits the Commission from ordering transmission service:

> which requires the transmitting utility subject to the order to transmit, during any period, an amount of electric energy which replaces any amount of electric energy--
>
> (A) required to be provided to such applicant pursuant to a contract during such period, or
>
> (B) currently provided to the applicant by the utility subject to the order pursuant to a rate schedule on file during such period with the Commission . . . .

Thus, section 211(c)(2) requires us to examine whether any of Florida Power's existing contracts with FMPA or its members require Florida Power to provide electric energy to

them, and therefore bar, the section 211 relief which FMPA requests. The only existing contracts with FMPA or its members are the TSAs and certain partial requirements contracts, discussed below.

Upon review of the existing TSAs, we find those contracts pose no section 211(c)(2) bar to our ordering of wheeling. The TSAs require Florida Power to provide transmission to FMPA. They do not require Florida Power to provide electric energy to FMPA. Section 211(c)(2), on its face, refers to contracts to provide electric energy (i.e., contracts for generation), not contracts to provide for transmission of electric energy.

Moreover, Congress, in establishing the Commission's basic jurisdiction in section 201 of the FPA, clearly distinguished between transmission of electric energy and sale of electric energy. It did not in section 201, or in any other sections of the FPA, use the term "electric energy" interchangeably with the term "transmission of electric energy." Of particular relevance here are sections 211 and 212 of the FPA, as amended by the Energy Policy Act, in which Congress specifically referred to the provision of transmission, rather than the provision of electric energy, when it so intended. For example, section 211(a) provides:

> Any electric utility, Federal power marketing agency, or any other person generating electric energy for sale for resale, may apply to the Commission for an order . . . requiring a transmitting utility to provide transmission services (including any

> enlargement of transmission capacity necessary to provide such services) to the applicant. [Emphasis added].
>
> In addition, section 212(a) provides that an order under section 211 requiring wheeling must contain such rates, charges, terms, and conditions that will "promote the economically efficient transmission and generation of electricity," and that will "ensure that, to the extent practicable, costs incurred in providing the wholesale transmission services . . . are recovered from the applicant for such order and not from a transmitting utility's existing wholesale, retail, and transmission customers." (Emphasis added).

Accordingly, we believe that had Congress intended existing transmission contracts to bar relief under section 211, Congress would have drafted section 211(c)(2)(A) to say "which replaces any amount of electric energy or transmission required to be provided . . . ." Similarly, section 211(c)(2)(B) would have been drafted to say "currently provided or transmitted to the applicant. . . ."[132]

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[132] The fact that the section 211(c)(2) prohibition applies only to contracts to provide electric energy, and not to contracts to provide transmission, does not mean that issues associated with existing transmission contracts do not have to be taken into account or resolved in determining whether and under what conditions to order section 211 transmission service. In this particular case, as stated supra, issues associated with existing

Having determined that the TSAs do not bar the Commission from ordering transmission service, we now turn to whether other Florida Power contracts to provide electric energy to FMPA's members fall within the 211(c)(2) bar. We note that Florida Power provides partial requirements service to four IDO Project participants, the Cities of Clewiston, Fort Pierce, Green Cove Springs and Jacksonville Beach, Florida (PR customers). The partial requirements tariff and service agreements that apply to service for the PR customers provide for an initial term of five years and, thereafter, until terminated in accordance with the PR tariff or service agreement. The partial requirements tariff also provides that the contract demand for partial requirements service will be set forth in Exhibit A of the tariff and will be in effect for the twelve-month period beginning on June 1 of each year. The contract demand can be changed upon written request of the customer made on or before March 1 of any year; however, it may not be increased or decreased by more than 25 percent in any one year.[133]

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transmission contracts (raised in Docket No. EL93-51-000) ultimately may be mooted by our action in Docket No. TX93-4-000. Accordingly, we will hold Docket No. EL93-51-000 in abeyance.

[133] We note that, in Docket No. ER93-465-000, in connection with Florida Power's "open access" transmission tariff, Florida Power proposed to revise the initial term to 10 years and to revise the notice conditions regarding changes in contract demands. The Commission has suspended those proposals until February 26, 1994 and set them for hearing. See 64 FERC P61,361, slip op. at pp. 12-14.

We also note that our review of the partial requirements tariff, Exhibit A, indicates that some of Florida Power's PR customers have reduced their contract demands under the partial requirements agreements. In fact,

With respect to the PR customers, FMPA argues that Congress' choice of the term "electric energy" in section 211(c)(2) means that the section 211(c)(2) bar does not apply unless the applicable power supply contract requires the customer under that contract to purchase specific amounts of energy from the transmitting utility. Therefore, FMPA argues, because the PR customers are required to purchase only the energy they schedule, section 211(c)(2) does not preclude the Commission from directing Florida Power to wheel on behalf of the PR customers.[134] We disagree. We do not believe the term "electric energy" in section 211(c)(2), which is used in section 201 and throughout the statute, is intended to create a distinction between the purchase of energy and the purchase of capacity, and that it applies only when the requesting utility explicitly prescribes the amount of energy to be purchased. Rather, we believe that the choice of the term "electric energy" describes a broader concept -- that of electric service, reflecting the fact that electric energy is the term generally used to describe the "commodity" that is physically delivered over the transmission system.

Thus, we find that section 211(c)(2) does constitute a bar to any request by FMPA for transmission of power that

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Florida Power has informed the Commission in its application, dated March 19, 1993, in Docket No. ER93-465-000, that Fort Pierce has already given notice of its intent to terminate service as of May 1, 1994.

[134] See supra notes 51 and accompanying text. As discussed above, see supra text accompanying note 86, Florida Power states that "it does not agree that Section 211 can be used to override existing contracts for transmission service," see Florida Power Answer at p. 62; nevertheless, Florida Power states that it "will respond to a specific good faith request for new 'network' transmission service from FMPA. . . ." Id. at p. 2.

would replace service that Florida Power provides under the PR tariff and service agreements. The bar would continue until the contractual obligation is terminated pursuant to the PR agreements. However, FMPA is not barred from requesting transmission service for power that would not replace purchases under the PR agreements.[135]

2. Other Issues Under Sections 211 and 212

a. Section 211(a): Public Interest

Section 211(a) of the Federal Power Act, as amended by the Energy Policy Act, provides, inter alia, that the Commission may issue an order requiring the transmitting utility to provide transmission services if it finds that the order meets the requirements of section 212 and would otherwise be in the public interest.

The Commission finds that ordering network transmission service will be in the public interest in this case and fully consistent with the purposes of the FPA. As the Supreme Court stated: "the principal purpose of [the FPA] was to encourage the orderly development of plentiful supplies of electricity . . . at reasonable prices."[136] As a general matter, the availability of transmission service (or increased flexibility to use transmission) will enhance competition in the market for power supplies over the long

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[135] Our review of the service agreements indicates that the customers' service under the PR agreements meets only a small portion of their needs.

[136] NAACP v. FPC, 425 U.S. 662, 669-70 (1975). See also id. at p. 670 n.5 (purpose of FPA is to assure abundant supply of electric energy throughout United States with greatest possible economy).

run because it will increase both the power supply options available to transmission customers (thereby benefitting their customers) and the sales options available to sellers. This should result in lower costs to consumers. In addition, if a transmission customer determines that flexible service, such as network service, will allow it to serve its customers more efficiently, we believe the public interest will be served by requiring that service to be provided so long as the transmitting utility is fully and fairly compensated and there is no unreasonable impairment of reliability.

In this case, network transmission service will allow FMPA and its members greater flexibility to economically dispatch their generation resources. This flexibility should give them the opportunity to benefit ratepayers by using their generation resources more efficiently. Thus, it is in the public interest for FMPA and its members to have the opportunity to achieve greater efficiency and ratepayer savings.[137]

b. Section 211(b): Reliability Considerations

Section 211(b) provides that an order cannot be issued under section 211 if "after giving consideration to consistently applied regional or national reliability standards, guidelines, or criteria, the Commission finds that such order

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[137] Florida Power argues that FMPA can achieve savings from the IDO project only if the price for transmission does not include reservation charges. See supra note 76. As discussed below, the specific price ($ /kW, etc.) for the network transmission service we are proposing to order has not been determined and FMPA may ultimately determine not to take the service it requests in this proceeding. However, whether a transmission requestor can actually achieve savings from the requested service is not a prerequisite to our determination of whether to order the service.

would unreasonably impair the continued reliability of electric systems affected by the order." No party has raised any reliability considerations,[138] and the Commission does not find that the provision of network service would necessarily impair the reliability of any electric systems that would be affected by a final order. In developing appropriate terms and conditions of network service, we expect FMPA and Florida Power to propose conditions to ensure that there is no unreasonable impairment to the continued reliability of electric systems affected by a final order.

c. FMPA's Request for Service

On July 14, 1993, the Commission issued a policy statement setting forth what it generally considers to constitute the minimum components of a good faith request for transmission service and a good faith response under section 213 of the FPA.[139] The Commission's policy statement sets forth 12 components of a good faith request: (1) the identity of the purchaser; (2) a statement of eligibility to request the services; (3) a statement that the request is to satisfy section 211(a) and 213(a), and is not a request for mandatory retail wheeling; (4) the type of service requested; (5) the names of other parties expected to deliver to or receive power from the transmitting utility; (6) the proposed commencement and termination dates of service; (7) the amount of service; (8) the expected transaction profile; (9)

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[138] Indeed, Florida Power asserts that this dispute is about price, not about whether Florida Power can or will provide the service. See supra notes 74-78 and accompanying text.

[139] See supra note 3.

the firmness of service requested; (10) whether the request is made in response to a solicitation; (11) the terms and conditions requested; and (12) additional information that would help the transmitting utility evaluate the request.[140]

FMPA argues that it should not be strictly held to the policy statement because FMPA filed its complaint prior to the issuance of the policy statement. FMPA argues that, since its request for transmission was made prior to the Commission's issuance of the policy statement:

> while it may be administratively sensible to apply "good faith" request to both Sections 211 and 213 in the future, it would defeat the purposes of the Energy Policy Act retroactively to require rigid adherence to the Good Faith Request Policy Statement where the basic substantive requirements for requests have been fully satisfied.[141]

FMPA also argues that its request substantially satisfies the requirements of a good faith request, given FMPA's repeated requests for network transmission service and given all of the information FMPA has provided to Florida Power since FMPA's 1989 request for such transmission.[142] In support of

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[140] See III FERC Statutes and Regulations at pp. 30,863-65. We note that comments concerning the policy statement are pending before the Commission.

[141] FMPA Response at pp. 17-18. In support of this argument, FMPA notes that the statute distinguishes between the requirements of a request under section 211 and the requirements of a good faith request under section 213. Id. at pp. 17-18 & n.25.

[142] Id. at pp. 15-18.

this argument, FMPA states that it has "either provided or offered to provide information sufficient to meet [the policy statement] requirements."[143]

Florida Power argues that FMPA's request was not a good faith request because FMPA has continually changed its proposal.[144] Florida Power argues that FMPA has not provided "much of the critical information" Florida Power needs to evaluate and respond to FMPA's request, and requests that FMPA provide further information.[145]

Florida Power requests that the Commission dismiss FMPA's section 211 request and allow FMPA to come forward with the information Florida Power needs to evaluate the transmission service FMPA requests. Florida Power states that, if FMPA is dissatisfied with Florida Power's response, it may file a section 211 application for an order directing Florida Power to provide transmission service.[146]

FMPA responds that it has provided sufficient information with which to analyze FMPA's request for transmission service, and urges the Commission to summarily order Florida Power to file a service commitment for network service for FMPA's IDO Project, and thus put an end to Florida Power's "strategy of delay and avoidance."[147]

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[143] Id. at p. 16. For a description of the specific information FMPA has provided, see supra text accompanying note 113.

[144] See supra text accompanying notes 89-90.

[145] Florida Power Answer at p. 5; see supra text accompanying notes 88-92.

[146] See supra text accompanying note 96.

[147] FMPA Response at p. 5.

We do not believe that we can fairly apply retroactively to FMPA the components contained in the good faith policy statement, given that FMPA's formal written request for network transmission service in 1989 pre-dated the Commission's good faith policy statement (which issued on July 21, 1993). However, we find that, in these circumstances, FMPA has complied with the requirements of the statute.

Here, it is uncontroverted that, after FMPA made its request on September 8, 1989: (1) FMPA met with Florida Power on many occasions to exchange information about the request; (2) FMPA promptly provided Florida Power with additional data that Florida Power requested; and (3) Florida Power had sufficient data to prepare at least two reports and to advise FMPA that it intended to conduct additional studies which Florida Power would commence after the February 1990 meeting.[148] It is also undisputed that Florida Power has yet to file a service agreement providing for the transmission service FMPA requests, and has requested for several years.

The information that Florida Power claims it has not received, and that it still needs to evaluate FMPA's request, involves very specific, technical information.[149] We do not find FMPA's alleged failure to provide such information is critical to a finding that it has complied with the requirements of the statute.[150] Although FMPA's initial request may not

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[148] See supra text accompanying note 113.

[149] Florida Power Answer at pp. 4-5.

[150] However, as noted above, we will require FMPA to update the data it has provided within 15 days of the date of this order.

have contained all of the information that Florida Power now claims is needed to evaluate the request for transmission service, the record evidence shows that FMPA has made a good faith effort to provide Florida Power with all the data Florida Power has requested. Thus, in view of the extensive information FMPA has provided to Florida Power over the two years of negotiation following the 1989 request (which Florida Power does not dispute), we find that FMPA has complied with the requirements of the statute.

d. Other Issues Raised by Florida Power

Florida Power states that FMPA should be required to state whether its request for transmission service is a "bona fide" request, whether it intends to abide by the Commission's section 211 decision, and whether it feels free to change its proposal during or at the end of a section 211 proceeding.[151] In support of this request, Florida Power claims that FMPA's consistent practice is to agree to and enter into a contract concerning a particular kind of transmission service and then to change its mind and "use pressure tactics to force [Florida Power] to abandon its existing contracts."[152] FMPA responds that any changes in position it has made in the past have simply reflected its attempts to respond to issues raised by Florida Power in order to further negotiations.[153]

Although we agree with Florida Power that the Commission's resources should not be dedicated to

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[151] Florida Power Answer at pp. 6 and 67.
[152] Id. at p. 6; see supra notes 93-95.
[153] See supra note 112.

proceedings which are, in effect, fishing expeditions, we have no reason to doubt FMPA's commitment to obtain network transmission service from Florida Power. It is clear that FMPA has requested network service for years and has pursued numerous strategies (nuclear licensing proceedings, negotiations, court proceedings and, in this proceeding, a section 211 application) in pursuit of its goal of obtaining network service.

Presumably, FMPA has undertaken this proceeding because it believes that the rates, terms and conditions the Commission will set for network transmission service will provide an economic basis for FMPA to implement the IDO Project. We note that the possibility exists that the rates, terms and conditions established in this proceeding may be different than FMPA hopes and, as a result, the IDO Project may not be economic. We do not believe a section 211 applicant for transmission services should be forced to agree to take the service before the rates, terms and conditions have been determined. Accordingly, we take this opportunity to clarify that if FMPA decides -- once the rates, terms and conditions have been set in this proceeding -- that the cost of the service under a section 211 order would be so high as to render the IDO Project uneconomic, FMPA has the option to continue to take service from Florida Power under the existing TSAs, until they are terminated.[154]

3. The Requirements of Section 212

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[154] If FMPA elects to continue to take service under the existing TSAs, the issues raised in Docket No. EL93-51- 000 would obviously not be mooted.

Section 212(c)(1) provides that, before issuing a final order under section 211, the Commission shall issue a proposed order setting a reasonable time for the parties to the proposed transmission order to agree to terms and conditions for carrying out the order, including the compensation and apportionment of costs. If the parties to the proposed transmission order are able to agree, the Commission will issue an order reflecting the agreed upon terms and conditions if the Commission approves of them. If the parties to the proposed transmission order are unable to agree within the allotted time, the Commission will prescribe the rates, terms and conditions of service.

Accordingly, we will give FMPA and Florida Power 60 days, commencing on the date FMPA provides updated data to support its request, to negotiate the rates, terms and conditions of the network transmission service ordered herein, consistent with section 212. We will also require FMPA and Florida Power to submit to the Commission, within 15 days after the expiration of the 60-day negotiation period, all rates, terms and conditions on which they have mutually agreed, accompanied by explanations and cost support. If there are matters still in dispute, the parties should file briefs to support their final positions, accompanied by any necessary cost support. We direct the parties to provide cost support information in sufficient detail to enable the Commission to establish final rates pursuant to section 212 or, at a minimum, to establish interim rates pending a final decision.[155] In order to allow FMPA and Florida Power to

[155] The Commission, of course, also will have the option of requiring the use of the TSAs on an interim basis.

prepare their briefs, they should exchange final positions on the sixtieth day of the negotiation period.[156]

The Commission orders:

(A) The timely, opposed motions to intervene by APPA, Texas Utilities and Duke are hereby granted.

(B) Florida Power is hereby ordered to provide network transmission service to FMPA, pursuant to sections 211 and 212, as discussed in the body of this proposed order.

(C) FMPA is directed to update the data it has previously provided to Florida Power with respect to its request for network transmission service within 15 days of the date of this order.

(D) FMPA and Florida Power are hereby directed to undertake procedures to implement Ordering Paragraph (B) above, as discussed in the body of this proposed order.

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[156] Briefs should be filed only by FMPA and Florida Power. As noted, supra at p. 35, other parties to the proceeding may file their comments in rehearing petitions of the final order issued under section 211.

APPENDIX C

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING REHEARING *EN BANC*

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1381 September Term, 2002

Filed On: March 28, 2003

Florida Municipal Power Agency,
Petitioner
v.

Federal Energy Regulatory Commission,
Respondent

Florida Power & Light Company,
Intervenor

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, and Garland, Circuit Judges

ORDER

Upon consideration of petitioner's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Michael C. McGrail
Deputy Clerk

APPENDIX D

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1381 September Term, 2002

Florida Municipal Power Agency,
Petitioner
v.

Federal Energy Regulatory Commission,
Respondent

Florida Power & Light Company,
Intervenor

Petitionf or Review of Orders of the Federal Energy Regulatory Commission

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Before: SENTELLE, HENDERSON and TATEL, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record compiled before the Federal Energy Regulatory Commission and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the petition for review be denied for the reasons set forth in the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Michael C. McGrail
Deputy Clerk

Date: January 21, 2003

Opinion for the court filed by Circuit Judge Tatel

APPENDIX E

STATUTORY AND CONSTITUTIONAL PROVISIONS

FEDERAL POWER ACT

SECTION 206 (16 USC §§ 824e) Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affected such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective

date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date 60 days after the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the expiration of such 60-day period. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order the public utility to make refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: Provided, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may

order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company" defined

Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: Provided, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended (15 U.S.C. 79 et seq.).

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy

CERTAIN WHEELING AUTHORITY

SEC. 211. (a) Any electric utility, Federal power marketing agency, or any other person generating electric energy for sale for resale, may apply to the Commission for an order under this subsection requiring a transmitting utility to provide transmission services (including any enlargement of transmission capacity necessary to provide such services) to the applicant. Upon receipt of such application, after public notice and notice to each affected State regulatory authority, each affected electric utility, and each affected Federal power marketing agency, and after affording an opportunity for an evidentiary hearing, the Commission may issue such order if it finds that such order meets the requirements of section 212, and would otherwise be in the public interest. No order may be issued under this subsection unless the applicant has made a request for transmission services to the transmitting utility that would be the subject of such order at least 60 days prior to its filing of an application for such order.

(b) RELIABILITY OF ELECTRIC SERVICE -- No order may be issued under this section or section 210 of this title if, after giving consideration to consistently applied regional or national reliability standards, guidelines, or criteria, the Commission finds that such order would unreasonably impair the continued reliability of electric systems affected by the order.

(c) Replacement of electric energy

(1) Repealed. Pub.
L. 102-486, title VII, Sec. 721(4)(A), Oct. 24, 1992, 106 Stat. 2915.
(2)
No order may be issued under subsection (a) or (b) of this section which requires the transmitting utility subject to the order to transmit, during any period, an amount of electric energy which replaces any amount of electric energy -

(A) required to be provided to such applicant pursuant to a contract during such period, or

(B) currently provided to the applicant by the utility subject to the order pursuant to a rate schedule on file during such period with the Commission: Provided, That nothing in this subparagraph shall prevent an application for an order hereunder to be filed prior to termination of modification of an existing rate schedule: Provided, That such order shall not become effective until termination of such rate schedule or the modification becomes effective.

(d)(1) Any transmitting utility ordered under subsection (a) or (b) of this section to provide transmission services may apply to the Commission for an order permitting such transmitting utility to cease providing all, or any portion of, such services. After public notice, notice to each affected State regulatory authority, each affected Federal power marketing agency, each affected transmitting utility, and each affected electric utility, and after an opportunity for an evidentiary hearing, the Commission shall issue an order terminating or modifying the order issued under subsection (a) or (b) of this section, if the electric utility providing such transmission services has demonstrated, and the Commission has found, that -

(A) due to changed circumstances, the requirements applicable, under this section and section 212 of this title, to the issuance of an order under subsection (a) or (b) of this section are no longer met, or

(B) any transmission capacity of the utility providing transmission services under such order which was, at the time such order was issued, in excess of the capacity necessary to serve its own customers is no longer in excess of the capacity necessary for such purposes, or

(C) the ordered transmission services require enlargement of transmission capacity and the transmitting utility subject to the order has failed, after making a good faith effort, to obtain the necessary approvals or property rights under applicable Federal, State, and local laws.

No order shall be issued under this subsection pursuant to a finding under subparagraph (A) unless the Commission finds that such order is in the public interest.

(2) Any order issued under this subsection terminating or modifying an order issued under subsection (a) or (b) of this section shall -

(A) provide for any appropriate compensation, and

(B) provide the affected electric utilities adequate opportunity and time to -

(i) make suitable alternative arrangements for any transmission services terminated or modified, and

(ii) insure that the interests of ratepayers of such utilities are adequately protected.

(3) No order may be issued under this subsection terminating or modifying any order issued under subsection (a) or (b) of this section if the order under subsection (a) or (b) of this section includes terms and conditions agreed upon by the parties which -

(A) fix a period during which transmission services are to be provided under the order under subsection (a) or (b) of this section, or

(B) otherwise provide procedures or methods for terminating or modifying such order

(including, if appropriate, the return of the transmission capacity when necessary to take into account an increase, after the issuance of such order, in the needs of the transmitting utility subject to such order for transmission capacity).

(e) As used in this section, the term "facilities" means only facilities used for the generation or transmission of electric energy

(16 U.S.C. 824j)

PROVISIONS REGARDING CERTAIN ORDERS REQUIRING INTERCONNECTION OR WHEELING

Sec. 212. (a) RATES, CHARGES, TERMS, AND CONDITIONS FOR WHOLESALE TRANSMISSION SERVICES -- An order under section 211 shall require the transmitting utility subject to the order to provide wholesale transmission services at rates, charges, terms, and conditions which permit the recovery by such utility of all the costs incurred in connection with the transmission services and necessary associated services, including, but not limited to, an appropriate share, if any, of legitimate, verifiable and economic costs, including taking into account any benefits to the transmission system of providing the transmission service, and the costs of any enlargement of transmission facilities. Such rates, charges, terms, and conditions shall promote the economically efficient transmission and generation of electricity and shall be just and reasonable, and not unduly discriminatory or preferential. Rates, charges, terms, and conditions for transmission services provided pursuant to an order under section 211 shall ensure that, to the extent practicable, costs incurred in providing the wholesale transmission services, and properly allocable to the provision of such services, are recovered from the applicant for such order and not from a

transmitting utility's existing wholesale, retail, and transmission customers.

(b) Repealed. Pub. L. 102-486, title VII, Sec. 722(1), Oct. 24, 1992, 106 Stat. 2916

(c) (1) Before issuing an order under section 824i of this title or subsection (a) or (b) of section 824j of this title, the Commission shall issue a proposed order and set a reasonable time for parties to the proposed interconnection or transmission order to agree to terms and conditions under which such order is to be carried out, including the apportionment of costs between them and the compensation or reimbursement reasonably due to any of them. Such proposed order shall not be reviewable or enforceable in any court. The time set for such parties to agree to such terms and conditions may be shortened if the Commission determines that delay would jeopardize the attainment of the purposes of any proposed order. Any terms and conditions agreed to by the parties shall be subject to the approval of the Commission.

(2) (A) If the parties agree as provided in paragraph (1) within the time set by the Commission and the Commission approves such agreement, the terms and conditions shall be included in the final order. In the case of an order under section 824i of this title, if the parties fail to agree within the time set by the Commission or if the Commission does not approve any such agreement, the Commission shall prescribe such terms and conditions and include such terms and conditions in the final order.

(B) In the case of any order applied for under section 211 of this title, if the parties fail to agree within the time set by the Commission, the Commission shall prescribe such terms and conditions in the final order.

(d) If the Commission does not issue any order applied for under section 210 or 211, the Commission shall, by order, deny such application and state the reasons for such denial.

(e) SAVINGS PROVISIONS -- (1) No provision of section 210, 211, 214, or this section shall be treated as requiring any person to utilize the authority of any such section in lieu of any other authority of law. Except as provided in section 210, 211, 214, or this section, such sections shall not be construed as limiting or impairing any authority of the Commission under any other provision of law.

(2) Sections 210, 211, 213, 214, and this section, shall not be construed to modify, impair, or supersede the antitrust laws. For purposes of this section, the term "antitrust laws" has the meaning given in subsection (a) of the first sentence of section 12 of title 15, except that such term includes section 45 of title 15 to the extent that such section relates to unfair methods of competition.

(f) (1) No order under section 210 or 211 requiring the Tennessee Valley Authority (hereinafter in this subsection referred to as the "TVA") to take any action shall take effect for 60 days following the date of issuance of the order. Within 60 days following the issuance by the Commission of any order under section 211 requiring the TVA to enter into any contract for the sale or delivery of power, the Commission may on its own motion initiate, or upon petition of any aggrieved person shall initiate, an evidentiary hearing to determine whether or not such sale or delivery would result in violation of the third sentence of section 15d(a) of the Tennessee Valley Authority Act of 1933 (16 U.S.C. 831n-4) hereinafter in this subsection referred to as the TVA Act

(2) Upon initiation of any evidentiary hearing under paragraph (1), the Commission shall give notice thereof to any applicant who applied for and obtained the order from the Commission, to any electric utility or other entity subject to such order, and to the public, and shall promptly make the

determination referred to in paragraph (1). Upon initiation of such hearing, the Commission shall stay the effectiveness of the order under section 210 or 211 until whichever of the following dates is applicable -

(A) the date on which there is a final determination (including any judicial review thereof under paragraph (3)) that no such violation would result from such order, or

(B) the date on which a specific authorization of the Congress (within the meaning of the third sentence of section 15d(a) of the TVA Act takes effect.

(3) Any determination under paragraph (1) shall be reviewable only in the appropriate court of the United States upon petition filed by any aggrieved person or municipality within 60 days after such determination, and such court shall have jurisdiction to grant appropriate relief. Any applicant who applied for and obtained the order under section 210 or 211, and any electric utility or other entity subject to such order shall have the right to intervene in any such proceeding in such court. Except for review by such court (and any appeal or other review by an appellate court of the United States), no court shall have jurisdiction to consider any action brought by any person to enjoin the carrying out of any order of the Commission under section 210 or section 211 requiring the TVA to take any action on the grounds that such action requires a specific authorization of the Congress pursuant to the third sentence of section 15d(a) of the TVA Act.

(g) PROHIBITION ON ORDERS INCONSISTENT WITH RETAIL MARKETING AREAS --

No order may be issued under this chapter which is inconsistent with any State law which governs the retail marketing areas of electric utilities.

(h) PROHIBITION ON MANDATORY RETAIL WHEELING AND SHAM WHOLESALE TRANSACTIONS -- No order issued

under this chapter shall be conditioned upon or require the transmission of electric energy:

(1) directly to an ultimate consumer, or

(2) to, or for the benefit of, an entity if such electric energy would be sold by such entity directly to an ultimate consumer, unless:

(A) such entity is a Federal power marketing agency; the Tennessee Valley Authority; a State or any political subdivision of a State (or an agency, authority, or instrumentality of a State or a political subdivision); a corporation or association that has ever received a loan for the purposes of providing electric service from the Administrator of the Rural Electrification Administration under the Rural Electrification Act of 1936; a person having an obligation arising under State or local law (exclusive of an obligation arising solely from a contract entered into by such person) to provide electric service to the public; or any corporation or association which is wholly owned, directly or indirectly, by any one or more of the foregoing; and

(B) such entity was providing electric service to such ultimate consumer on October 24, 1992, or would utilize transmission or distribution facilities that it owns or controls to deliver all such electric energy to such electric consumer.

Nothing in this subsection shall affect any authority of any State or local government under State law concerning the transmission of electric energy directly to an ultimate consumer.

(i) LAWS APPLICABLE TO FEDERAL COLUMBIA RIVER TRANSMISSION SYSTEM

(1) The Commission shall have authority pursuant to section 210, section 211, this section, and section 213 to (A) order the Administrator of the Bonneville Power Administration to provide transmission service and (B) establish the terms and

conditions of such service. In applying such sections to the Federal Columbia River Transmission System, the Commission shall assure that -

(i) the provisions of otherwise applicable Federal laws shall continue in full force and effect and shall continue to be applicable to the system; and

(ii) the rates for the transmission of electric power on the system shall be governed only by such otherwise applicable provisions of law and not by any provision of section 210, section 211, this section, or section 213, except that no rate for the transmission of power on the system shall be unjust, unreasonable, or unduly discriminatory or preferential, as determined by the Commission.

(2) Notwithstanding any other provision of this chapter with respect to the procedures for the determination of terms and conditions for transmission service --

(A) when the Administrator of the Bonneville Power Administration either (i) in response to a written request for specific transmission service terms and conditions does not offer the requested terms and conditions, or (ii) proposes to establish terms and conditions of general applicability for transmission service on the Federal Columbia River Transmission System, then the Administrator may provide opportunity for a hearing and, in so doing, shall -

(I) give notice in the Federal Register and state in such notice the written explanation of the reasons why the specific terms and conditions for transmission services are not being offered or are being proposed;

(II) adhere to the procedural requirements of paragraphs (1) through (3) of section 839e (i) of this title, except that the hearing officer shall, unless the hearing officer becomes unavailable to the agency, make a

recommended decision to the Administrator that states the hearing officer's findings and conclusions, and the reasons or basis thereof, on all material issues of fact, law, or discretion presented on the record; and

(III) make a determination, setting forth the reasons for reaching any findings and conclusions which may differ from those of the hearing officer, based on the hearing record, consideration of the hearing officer's recommended decision, section 211 and this section, as amended by the Energy Policy Act of 1992, and the provisions of law as preserved in this section; and

(B) if application is made to the Commission under section 211 for transmission service under terms and conditions different than those offered by the Administrator, or following the denial of a request for transmission service by the Administrator, and such application is filed within 60 days of the Administrator's final determination and in accordance with Commission procedures, the Commission shall -

(i) in the event the Administrator has conducted a hearing as herein provided for (I) accord parties to the Administrator's hearing the opportunity to offer for the Commission record materials excluded by the Administrator from the hearing record, (II) accord such parties the opportunity to submit for the Commission record comments on appropriate terms and conditions, (III) afford those parties the opportunity for a hearing if and to the extent that the Commission finds the Administrator's hearing record to be inadequate to support a decision by the Commission, and (IV) establish terms and

conditions for or deny transmission service based on the Administrator's hearing record, the Commission record, section 824j of this title and this section, as amended by the Energy Policy Act of 1992, and the provisions of law as preserved in this section, or

(ii) in the event the Administrator has not conducted a hearing as herein provided for, determine whether to issue an order for transmission service in accordance with section 211 and this section, including providing the opportunity for a hearing.

(3) Notwithstanding those provisions of section 313(b) of this Act (16 U.S.C. 8251) which designate the court in which review may be obtained, any party to a proceeding concerning transmission service sought to be furnished by the Administrator of the Bonneville Power Administration seeking review of an order issued by the Commission in such proceeding shall obtain a review of such order in the United States Court of Appeals for the Pacific Northwest. Electric Power Planning and Conservation Act (16 U.S.C. 839a(14)).

(4) To the extent the Administrator of the Bonneville Power Administration cannot be required under section 211, as a result of the Administrator's other statutory mandates, either to (A) provide transmission service to an applicant which the Commission would otherwise order, or (B) provide such service under rates, terms, and conditions which the Commission would otherwise require, the applicant shall not be required to provide similar transmission services to the Administrator or to provide such services under similar rates, terms, and conditions.

(5) The Commission shall not issue any order under section 210, section 211, this section, or section 213 requiring the Administrator of the Bonneville Power Administration to provide transmission service if such an

order would impair the Administrator's ability to provide such transmission service to the Administrator's power and transmission customers in the Pacific Northwest, as that region is defined in section 3(14)of the Pacific Northwst Electric Power Planning and Conservation Act (16 U.S.C. 839a(14)), as is needed to assure adequate and reliable service to loads in that region.

(j) EQUITABILITY WITHIN TERRITORY RESTRICTED ELECTRIC SYSTEMS -- With respect to an electric utility which is prohibited by Federal law from being a source of power supply, either directly or through a distributor of its electric energy, outside an area set forth in such law, no order issued under section 211 may require such electric utility (or a distributor of such electric utility) to provide transmission services to another entity if the electric energy to be transmitted will be consumed within the area set forth in such Federal law, unless the order is in furtherance of a sale of electric energy to that electric utility: Provided, however, That the foregoing provision shall not apply to any area served at retail by an electric transmission system which was such a distributor on October 24, 1992, and which before October 1, 1991, gave its notice of termination under its power supply contract with such electric utility.

(k) ERCOT UTILITIES --

(1) RATES.-- Any order under section 211 requiring provision of transmission services in whole or in part within ERCOT shall provide that any ERCOT utility which is not a public utility and the transmission facilities of which are actually used for such transmission service is entitled to receive compensation based, insofar as practicable and consistent with subsection (a) of this section, on the transmission ratemaking methodology used by the Public Utility Commission of Texas.

(2) DEFINITIONS -- For purposes of this subsection -

(A) the term "ERCOT" means the Electric Reliability Council of Texas; and

(B) the term "ERCOT utility" means a transmitting utility which is a member of ERCOT

HEARINGS; RULES OF PROCEDURE

SEC. 308. (a) Hearings under this chapter may be held before the Commission, any member or members thereof or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission, in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality, or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

(b) All hearings, investigations, and proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this Act.
(18 U.S.C. 825g)

Sec. 313 Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and

thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order

Administrative Procedure Act

Sec. 702. - Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought

Sec. 703. - Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement

Sec. 704. - Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority

Sec. 706. - Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and

determine the meaning or applicability of the terms of an agency action. The reviewing court shall -

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX F

STATEMENT BY COMMISSIONER PAT WOOD, III AT FERC OPEN MEETING, JULY 25, 2001

Statement by Commissioner Pat Wood, III at FERC Open Meeting, July 25, 2001

"The first question to be asked and, this was in Florida, this was Florida Municipal Power Agency vs. Florida Power & Light Company, an old case that I think the terminators must have got up here. It's a TX93 case – which was almost when I was here before. Anyway it's going out. It's denying rehearing, and I guess I would have probably granted rehearing. Keep it here a little longer for familiarity. But in that order, there is kind of a threshold question: is the facility that we are talking about part of the grid? And this matters a lot to RTO policy when we get there. Are these, and they generally tend to be on the lower voltage end of the spectrum – these more radial lines or smaller stuff – are they included in the pot of transmission that we're trying to put an RTO wide rate on top of? And from reading this case, I mean, it looks like FMPA has such facilities in the Florida region. And in Order 888 the Commission did state a test that says for basically these facilities to be included under the pot of dollars, they have to be not only integrated with the system but provide additional benefits to the grid in terms of capability and reliability. Quite frankly, that's a pretty low standard and I'm not sure why it wasn't made in this case. It seems to me to be an evidentiary issue here that FMPA didn't demonstrate it at all, but so I'm probably going to let this order go because I think you got to get lawyers that can make a case. But I don't think that standard of non-integration is at all an obstacle, and I would be very liberal in interpreting 888. I don't think we need to change 888 to do that, but it's not, it's difficult for me to, unless you're a DC line that's at a low enough voltage where you can say you're not transmission, everything is integrated. These electrons flow like the laws of physics, and not by FERC rules. And I think

pretty much everything that does transmission ought to be included in transmission, and ought to be included in RTO wide postage stamp rates, so I would just make that note and join in the order without writing or concurring or doing something separate, but just say I think integration is a pretty easy standard, and I wish it had been the case before it had been made here."

APPENDIX G

PLEADING REFERENCES TO EVIDENCE OF INTEGRATION SUBMITTED BY FMPA

Appendix A to Initial Brief of Petitioner Florida Municipal Power Agency in *Florida Municipal Power Agency v. Federal Energy Regulatory Commission,* Case No. 01-1381
315 F.3d 362 (D.C. Cir. 2003)

	Pleading	**Evidence In Docket No. TX93-4 Record Referenced In Pleadings**	**Evidence Submitted In Docket No. TX93-4 But Not Admitted Into Evidence Referenced In Pleadings**	**Evidence In Docket No. ER93-465 Record Referenced In Pleadings**
Ft. Pierce-Vero Beach	R-51 at 7.	Fourth Aff. of Albert B. Malmsjo[1]		
	R-53 at 6 -7.	Fifth Aff. of Albert B. Malmsjo[2]		

[1] The Fourth Affidavit of Albert B. Malmsjo was filed repeatedly in Docket No. TX93-4 as R47/3, R51/3 and R63/J.

[2] The Fifth Affidavit of Albert B. Malmsjo was filed with FERC in Docket No. TX93-4 as R53/1 and R63/C.

Pleading References to Evidence of Integration Submitted by FMPA

	Pleading	**Evidence In Docket No. TX93-4 Record Referenced In Pleadings**	**Evidence Submitted In Docket No. TX93-4 But Not Admitted Into Evidence Referenced In Pleadings**	**Evidence In Docket No. ER93-465 Record Referenced In Pleadings**
	R-63 at 24.	Fourth Aff. of Albert B. Malmsjo; Fifth Aff. of Albert B. Malmsjo		

Pleading References to Evidence of Integration Submitted by FMPA

	Pleading	Evidence In Docket No. TX93-4 Record Referenced In Pleadings	Evidence Submitted In Docket No. TX93-4 But Not Admitted Into Evidence Referenced In Pleadings	Evidence In Docket No. ER93-465 Record Referenced In Pleadings
	R-83 at 15-19	Aff. of Joe N. Linxwiler Jr.[3], pp. 3-4, 6; Memorandum of Joe N. Linxwiler, Jr[4]., pp. 2-3; Fourth Aff. of Albert B. Malmsjo, p. 6-7, ¶¶16,17,19; Fifth Aff. of Albert B. Malmsjo, pp. 2-4;		FC-54:138,140-42,151-53;FC-57;FC-58;FC-59;FC-67:14-17;FC-69;FC-70:6-7, 26;FC-176:15-16,28-29, 32, 44;FC-179; FC-180;FC-181 generally & at 13ff;FPL-1:10-12;Tr. 6991-93,7000-01, 7003-06,7008,7012, 7023-27;7286-90;7845-46.

G-3

[3] The Affidavit of Joe N. Linxwiler, Jr. was filed with FERC as both R47/2 and R51/2.

[4] The Memorandum of Joe N. Linxwiler, Jr. was submitted as R53/3.

Pleading References to Evidence of Integration Submitted by FMPA

	Pleading	**Evidence In Docket No. TX93-4 Record Referenced In Pleadings**	**Evidence Submitted In Docket No. TX93-4 But Not Admitted Into Evidence Referenced In Pleadings**	**Evidence In Docket No. ER93-465 Record Referenced In Pleadings**
Lake Worth	R-83 at 19-21.	Aff. of Joe N. Linxwiler Jr., p. 4; Memorandum of Joe N. Linxwiler, Jr., pp. 2-3	R-66 and Appended *Florida Power & Light Company Proposal for the Purchase of the City of Lake worth, Florida Electric System*, dated September 1, 1994.	FC-71: 5;FC-176:29-30;Tr. 7004-06,7008, 7845-50.
	R-106 at 10.			FC-176:30;FC-70:7;FC-71.
Key West	R-51 at 7.	Fourth Aff. of Albert B. Malmsjo;		

Pleading References to Evidence of Integration Submitted by FMPA

	Pleading	Evidence In Docket No. TX93-4 Record Referenced In Pleadings	Evidence Submitted In Docket No. TX93-4 But Not Admitted Into Evidence Referenced In Pleadings	Evidence In Docket No. ER93-465 Record Referenced In Pleadings
	R-83 at 21-22.	Aff. of Joe N. Linxwiler, p. 4 ¶¶5(c)(2), 6(a)(c); Memorandum of Joe N. Linxwiler, Jr., p. 4.		
Clewiston, Green Cove Springs, and Jacksonville Beach	R-63 at 20.	Exhibits A to FPL Partial Requirements Service Agreements with Clewiston, Green Cove Springs, and Jacksonville Beach[5]; Aff. of Nicholas P. Guarriello[6]		

[5] Filed in TX93-4 as R63/H.

[6] Filed in TX93-4 as bothR1/20 and R63/I.

Pleading References to Evidence of Integration Submitted by FMPA

	Pleading	Evidence In Docket No. TX93-4 Record Referenced In Pleadings	Evidence Submitted In Docket No. TX93-4 But Not Admitted Into Evidence Referenced In Pleadings	Evidence In Docket No. ER93-465 Record Referenced In Pleadings
Jacksonville Electric Authority to Jacksonville Beach 138 kV tie	R-53 at 7	Fifth Aff. of Albert B. Malmsjo ¶¶9-11		
	R-63 at 24.	Fourth Aff. of Albert B. Malmsjo; Fifth Aff. of Albert B. Malmsjo, generally and at ¶¶9-11.		
Generally	R-29 at 118 – 120.	Second Malmsjo Aff. ¶35(a)[7].		
	R-51 at 6 – 7.	Aff. of Joe N. Linxwiler, Jr.; Fourth Aff. of Albert B. Malmsjo		

[7] The Second Affidavit of Albert B. Malmsjo entered the record as R29/E.

Pleading References to Evidence of Integration Submitted by FMPA

	Pleading	Evidence In Docket No. TX93-4 Record Referenced In Pleadings	Evidence Submitted In Docket No. TX93-4 But Not Admitted Into Evidence Referenced In Pleadings	Evidence In Docket No. ER93-465 Record Referenced In Pleadings
	R-63 at 25.	Third Aff. of Albert B. Malmsjo[8]; Summary and Explanation of FMPA's Modifications to FPL's Filing and redlined Network Integration Service Agreement[9]; IDO Project/Transmission System Investment Book[10]		

[8] The Third Affidavit of Albert B. Malmsjo was repeatedly submitted to the record in TX93-4 as R31, R33/2, R47/4, R51/4 and R63/G.

[9] Entered in TX93-4 as R63/A.

[10] Entered into evidence in TX93-4 as R53/1 and R63/C, this extensive evidence of integration was first given to FPL in May,

Pleading References to Evidence of Integration Submitted by FMPA

	Pleading	Evidence In Docket No. TX93-4 Record Referenced In Pleadings	Evidence Submitted In Docket No. TX93-4 But Not Admitted Into Evidence Referenced In Pleadings	Evidence In Docket No. ER93-465 Record Referenced In Pleadings
	R-53 at 8	Aff. of Joe N. Linxwiler, Jr.; IDO Project/Transmission System Investment Book and Memorandum of Joe N. Linxwiler, Jr.		

1994 as part of an attempt at settlement on this issue.

Pleading References to Evidence of Integration Submitted by FMPA

	Pleading	Evidence In Docket No. TX93-4 Record Referenced In Pleadings	Evidence Submitted In Docket No. TX93-4 But Not Admitted Into Evidence Referenced In Pleadings	Evidence In Docket No. ER93-465 Record Referenced In Pleadings
	R-83 at 11 & n. 5.	IDO Project/Transmission System Investment Book, Third Affidavit of Albert B. Malmsjo, pp. 1-3; Fourth Affidavit of Albert B. Malmsjo, pp. 6-7; Fifth Affidavit of Albert B. Malmsjo, pp. 1-5; Joe N. Linxwiler's Memorandum; Affidavit of Joe N. Linxwiler, Jr., pp. 4, 6-7.		

Pleading References to Evidence of Integration Submitted by FMPA

	Pleading	Evidence In Docket No. TX93-4 Record Referenced In Pleadings	Evidence Submitted In Docket No. TX93-4 But Not Admitted Into Evidence Referenced In Pleadings	Evidence In Docket No. ER93-465 Record Referenced In Pleadings
	R-106 at 3, 9-10.			FC-54:151-156;FC-67: 13-17; FC-68; FC-69; FC-70: 6-8; FC-176: 4-16, 21-25, 28-34; FC-176; FC-179; FC-182.
	R-109 at 17-18 & n.9.	Second Aff. of Albert B. Malmsjo at ¶¶12, 14; Aff. of Joe N. Linxwiler, Jr. at ¶5; Fourth Aff. of Albert B. Malmsjo at ¶19; Third Aff. of Albert B. Malmsjo at ¶3; Affidavit of Nicholas P. Guarriello at ¶¶5, 6.		FC-54:151-156;FC-67:13-17; FC-68; FC-69;FC-70: 6-8;FC-71; FC-176: 4-16,21-25, 28-34;FC-176;FC-179

Pleading References to Evidence of Integration Submitted by FMPA

APPENDIX H

FLORIDA MUNICIPAL POWER AGENCY'S REQUEST FOR REHEARING

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Florida Municipal Power Agency Florida Power & Light Co.	Docket Nos. TX93-4-002 and EL93-51-002

FLORIDA MUNICIPAL POWER AGENCY'S REQUEST FOR REHEARING

I. Introduction and Statement of Position

Pursuant to Rule 713 of the Commission's Rules of Practice and Procedure, 18 CFR § 385.713, the Florida Municipal Power Agency ("FMPA") seeks rehearing of the Commission's Order Granting Clarification in Part, Denying Rehearing and Accepting Compliance Filing as Modified ("January 5, 1996 Order"). At the outset, FMPA recognizes and appreciates the extensive time and effort that the Commission has expended in its orders to provide network transmission availability on fair terms for FMPA and for the benefit of the public. The Commission is seeking to formulate network and other transmission rules. These will aid in achieving competitive wholesale power markets. FMPA supports this effort.[1]

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[1] FMPA is aware of the Commission's workload and is seeking to resolve issues with Florida Power & Light Co. to the extent possible. To date, it has not been possible to reach agreement on key issues.

In its January 5, 1996 Order, the Commission provides for network transmission service. On the key issue of whether FMPA is entitled to receive credit against its load ratio share for transmission facilities owned by FMPA or its members, the Commission holds that FMPA is not entitled to credits because its facilities are not "integrated" with FPL's transmission system. Order at 12-15. Facially, the Commission adheres to the standard set forth in its Final Order, issued May 11, 1994. There, the Commission said:

> If FMPA has transmission facilities that will operate as part of the integrated system, a credit would be reasonable....If FMPA owns grid facilities that are now used to integrate the same [FMPA] resources and loads, those facilities are part of the integrated transmission system, and Florida Power must include an appropriate credit for any such grid facilities when it submits its compliance filing in the case.

67 FERC ¶ 61,167, at 61,482 n. 76.

However, in its January 5, 1996 Order, the Commission effectively rejects the conclusion that there will be an "integrated transmission system" or a "combined....transmission grid." *Compare* Final Order, 67 FERC at 61,482 n. 76 *with* Jan. 5, 1996 Order at 13. Read literally, the Commission appears to rule that to establish an entitlement to credits, a customer must own "transmission facilities that will operate as part of the integrated transmission system." *Id.* The Commission also appears to

adopt a test of "benefits" to the transmission provider. Under these standards, at least as applied, a transmission provider can veto credits by simply refusing to integrate a network customer's facilities with its own. Moreover, because electricity flows over all facilities, a transmission provider can deny credits merely by saying that a customer's facilities are not integrated with its own, without suffering any operational consequences. As discussed in Section III, *infra,* FPL receives direct benefits from FMPA transmission.

So long as its judgments are rational and neither arbitrary nor discriminatory, under the Administrative Procedures Act and Federal Power Act, the Commission may choose among different ratemaking standards. *Permian Basin Area Rate Cases,* 390 U.S. 747 (1968). It may limit the grid to the transmission provider's facilities, as it does in its January 5, 1996 Order, and, therefore, provide for transmission rates based upon the customer's use of (*i.e.,* load flows over) those facilities. It may recognize a combined grid including both the transmission provider's and customer's facilities as it did in its Final Order, and, given that the customer's local generation and loads are within the parameters of the transmission grid, provide for charges based upon the total loads of the customer with credits for customer-owned facilities. However, as the Commission appears to agree, the standard for ordering credits must be applied consistently with the standard for defining the grid for purposes of costing and setting rates. What the Commission cannot do is treat the grid expansively for establishing FPL's rates, thereby allowing FPL to charge FMPA based on the premise that all of FMPA's loads are within FPL's transmission grid, but treat the grid narrowly

for establishing customer credits, based on the premise that FMPA's transmission is beyond FPL's transmission grid.[2]

FMPA believes that from the standpoint of encouraging competitive sales markets and furthering reliability and generation coordination, it would be preferable for the Commission to recognize the existence of a transmission grid broader than one limited to the transmission provider's facilities and to provide for credits for transmission facilities owned by transmission users which are within the parameters of that broader grid. The crediting methodology announced in the Commission's Final Order allows for a "combined transmission grid" without forcing mergers as the only way to achieve comparable transmission access. Crediting customer-owned facilities protects transmission dependent entities from paying multiple transmission charges for transmission. Under load ratio pricing without credits, customers pay for both investments in their own transmission and for their use of others' facilities on a full load ratio basis.

Crediting promotes the establishment of regional transmission arrangements because entities do not have to pay multiple charges to use others' facilities within the region. Transmission owners pay proportionately for their use of the entire grid by contributing facilities and, if they are underinvested, by paying an additional transmission rate.

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[2] Of course, the Commission may consider the application of standards other than those mentioned, so long as they are applied rationally and in a non-discriminatory manner.

This pricing mechanism enables market participants to buy and sell power over broad markets on a non-discriminatory basis and promotes generation and sales competition.

Further, the credits methodology encourages electrical coordination and aids reliability. It encourages coordination by making generated power available over a broad transmission system without imposing a multiplicity of charges. Thus, if an entity has power available for emergency, maintenance or other uses, that power can be made available through reserve sharing interchange agreements throughout the grid on a least-cost basis. Because each system contributes and has paid for grid facilities on a proportionate basis, load ratio pricing with credits encourages joint planning and sensible transmission construction, which aid reliability.

The Commission may have been reluctant to accept FMPA's credits argument in light of FPL's claims that such crediting would permit FMPA to get network transmission "for free." Such arguments ignore the fact that utilities, including FPL, can and do pay for transmission either through rate payments or by making transmission investments. The investments of FPL and FMPA and its members all bear real economic costs. It is a fact that FMPA is overinvested in the transmission system. Moreover, the sad fact is that often the largest systems have been able to work out mutually satisfactory transmission arrangements to the exclusion of transmission dependent systems because of the leverage they can wield as a result of their transmission ownership. Transmission monopolies are often free to exclude smaller or more isolated utilities.

The Federal Power Act is not meant to confirm existing utility monopoly bargaining power. *Gulf States Utils. Power Co. v. F.P.C.,* 411 U.S. 747 (1973). It must be apparent to all that absent transmission owners' strategic domination of transmission, mutually satisfactory transmission arrangements with smaller systems would have been reached years ago.

FMPA recommends that the Commission re-adopt the principles contained in its Final Order, but recognizes that the Commission may choose to adhere to the methodology which it adopts in its January 5, 1996 Order. In that event, FMPA seeks a limited Rehearing of the Commission's January 5, 1996 Order. Its purpose is to seek clarification to ensure that the standards which the Commission adopts in that Order will be applied rationally and uniformly to conform to the comparability standard. Specifically, FMPA wants to ensure that if its and its members' transmission is considered beyond the relevant transmission grid, and therefore not entitled to credits, the Commission recognizes that FMPA's and members' local generation and loads are also beyond the FPL transmission grid. In that event, FMPA should not have to include in its load ratio share those levels of load which are served by nearby generation not using the FPL transmission system. FMPA believes that this result is what the Commission intended in Section E of its January 5, 1996 Order, pages 19-23 of the slip opinion.

Further, FMPA wants to ensure that the Commission is holding that the same standards which are used to determine whether FMPA transmission is part of the grid will

also be applied to FPL in determining what transmission should be included in FPL's rate base. FMPA believes that this is what the Commission intended in footnote 48 on page 13 of the slip opinion.

FMPA seeks rehearing on the exclusion of all of its transmission from eligibility for credits. As a related matter, FMPA seeks rehearing on the failure of the Commission to incorporate relevant portions of the record in FPL's recently concluded rate case in Docket Nos. ER93-465-000 *et al.* ("Rate Case"). It is demonstrable that under the standards of the Commission's January 5, 1996 Order, at least some of FMPA's transmission, most notably the Ft. Pierce-Vero Beach line, is eligible for credits.

For reasons explained herein, FMPA seeks clarification that the Commission did not adopt rules under which FPL would have to give revenue credits from power sales from its Scherer plant in Georgia to Georgia Power Company, Alabama Power Company, Duke Power Company or to any other entity where the transaction does not use FPL's transmission system.

Finally, FMPA seeks clarification that the Commission does not intend to allow FPL to double-charge FMPA under its transmission service agreements and under the network rate.

II. FMPA requests that the Commission confirm that if FMPA uses local generation to serve loads which are beyond the FPL transmission network, these loads need not be

included in FMPA's load ratio share calculation for setting transmission rates.

The Commission has determined that none of FMPA's or its members' transmission is to be considered part of the FPL transmission grid or is entitled to credits. Obviously, therefore, when FMPA's loads are supplied with power from nearby generation using transmission facilities that are solely owned by FMPA or its members, the FPL transmission grid is not being used. This conclusion follows for the same reason that a load served in Orlando from generation in Orlando, connected to the Orlando utilities transmission system, does not use the FPL grid. Similarly, loads served by Florida Power Corporation using Florida Power Corporation generation, connected to the Florida Power Corporation transmission system, do not use the FPL transmission grid. Loads served by the Jacksonville Electric Authority or Tampa Electric Company, from generation connected to the Jacksonville or Tampa transmission systems, are not served through the FPL grid. Under these circumstances, it would be entirely inconsistent with the January 5, 1996 Order, which rejects the notion of a "combined" grid, to charge FMPA for transmission of power from its own or city-owned generation which is directly connected to FMPA or City transmission and which does not use FPL transmission to serve load. *Compare* 67 FERC at 61,481, 61,482 n. 76.

The Commission's premise for accepting FPL's load ratio proposal in its Final Order was:

> The proposal recognizes that a transmission system is designed to meet the needs of native load and the needs of native load are defined primarily by the size of the load to be served. It incorporates FMPA's load as though that load were part of Florida Power's native load. Because the transmission system to support this hypothetical melding of customers must be designed and operated - and fixed costs must be incurred - to meet the combined loads of Florida Power and FMPA, it makes sense that each would pay based on its contribution to the system loads to be served by the transmission network.

67 FERC at 61,481. (Emphasis supplied.)

It was in this context that the Commission said in footnote 76:

> If FMPA has transmission facilities that will operate as part of the integrated transmission system, a credit would be reasonable. Indeed, this is in line with Florida Power's position that it is redefining the native load served by the Florida Power transmission system to include all of FMPA's resources and loads. If FMPA owns grid facilities that are now used to integrate the same resources and loads, those facilities are part of the integrated transmission system, and Florida Power must include an appropriate credit for any such grid

> facilities when it submits its compliance filing in this case.

Id. at 61,482. (Emphasis supplied.)

Generated power cannot reach FMPA or its members' loads without using FMPA or member transmission. If that transmission did not exist and FPL were solely responsible for transmission, FPL would have to construct it (*i.e.*, construct "the grid facilities...used to integrate the same [FMPA] resources and loads," *id.*). FPL would include such transmission as part of its rate base.

In contrast to the Final Order, the Commission asserts in its January 5, 1996 Order that the FMPA transmission facilities are not integrated with FPL's transmission system. Therefore, the Commission holds that no credits are appropriate. Jan. 5, 1996 Order, slip op. at 13. With respect to the Ft. Pierce-Vero Beach transmission line (and applicable to other lines) the Commission finds:

> The fact that the Ft. Pierce/Vero Beach line constitutes a parallel path and is subject to occasional loop flows does not, in and of itself, compel a conclusion that the line now operates as part of the Florida Power integrated transmission network.

Id. at 14. The Commission adds:

> If such were the case, Florida Power would be required to offer credits to all transmission

> customers who happened to be interconnected to its system at more than one point.

Id. at 14 n. 51.

Under these circumstances, the Commission cannot say that FMPA is using FPL transmission to connect local generation to local loads in any meaningful sense and also be consistent with its January 5, 1996 Order. Therefore, not surprisingly, the Commission grants "FMPA's requested clarification in part," holding that FMPA may "choose to serve an amount of load in a city from generation located in the city, so long as FMPA does not sometimes serve that level of load from external generation or use that generation to serve member loads outside the city." Jan. 5, 1996 Order, slip op. at 20,19. The Commission states:

> We did not intend to imply that FMPA must create physical, electrical isolation in order to isolate a load and resource from the grid.

Id. at 20.

FMPA believes that the Commission granted its clarification request in order to be consistent with its holding that FMPA transmission which connects local generation and which is used to serve member loads is beyond the grid and, therefore, is not entitled to credits. FMPA's understanding of the Commission's Order at 20 is that FMPA may serve local loads using its own transmission without paying a transmission charge to FPL. It may alternatively serve such loads from <u>other</u> generation, which does use the FPL

transmission system, by paying FPL an additional point-to-point transmission charge.[3]

It would be discriminatory and non-comparable to hold, at the same time, that a city would not get credit for transmission which it has built and paid for to connect local generation to loads on grounds that such transmission is beyond the FPL transmission grid, and to hold that, in addition to its transmission investments, FMPA must pay FPL for transmission from local generation to those local loads using FMPA's own transmission. FMPA would be paying a double charge: it would be paying a load ratio transmission charge for deliveries to serve those "isolated" loads and it would be paying additionally for its transmission investments to serve those same local loads. Such a result would be both irrational and incompatible with the comparability principle.

III. Under the standard set by the Commission for crediting customer-owned facilities, credits should be allowed for the Ft. Pierce-Vero Beach, Lake Worth, Key West and other lines.

The Commission has decided: "The integration of facilities into the plans or operations of a transmitting utility is the proper test for cost recognition ....." Jan. 5, 1996 Order, slip op. at 13. The Commission tests for such integration by examining whether the facilities are "used by Florida Power to provide transmission service to FMPA or

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[3] If FMPA does so without purchasing firm transmission from FPL, FMPA bears the risk of any unavailability of transmission.

any other party." *Id.* In part, the Commission appears to adopt a "benefits to the transmission provider" test.

For purposes of this case, FMPA accepts the standards announced in the Commission's January 5, 1996 Order, unless they are interpreted or applied to give FPL a veto over whether transmission dependent systems can get credits. *See* Section I, *supra.*[4] The record in this case and the record in Docket No. ER93-465-000 show that FMPA is entitled to credits for at least three specific facilities: the Fort Pierce-Vero Beach line, the Lake Worth line and the Key West line. In fact, even under the standards contained in the January 5, 1996 Order, credits for all requested transmission are justified.[5] Since a more complete record on this issue

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[4] The Commission should make clear that FPL will not be permitted to avoid credits by unreasonably refusing to jointly plan. "A sharing of obligations which encourages parties to have transmission investments approximating their load ratio shares is desirable...[W]here a customer can construct or finance facilities more economically or efficiently than the Transmission Provider, it ought to be able to do so." *See* FC-176/8. Such a result is consistent with the FPA §202(a) duty to "promote and encourage" regional coordination and consistent with the Commission's requirements that regional transmission group participants "mak[e] a commitment in time and effort to meet with each other to combine and coordinate their individual plans into a single plan to create a transmission system that best meets the needs of all users in the region, both technically and economically." *Southwest Regional Transmission Assoc.,* 69 FERC ¶ 61,100, at 61,399 (1994) ("*SWRTA*").

[5] FMPA refers the Commission to the book showing IDO Project/Transmission System Investment, which is App. 1 to the "Conditional Response on Behalf of Florida Municipal Power Agency" (July 1, 1994) and also App. C to the "Protest of the Florida Municipal Power Agency to Florida Power & Light Company's Compliance Filing"

was developed in the Rate Case, it is appropriate -- indeed mandated -- that the Commission take into account the record in that case.

A. The Record in the Docket No. ER93-465-000 Rate Case Should be Considered.

The Parties agree, and the Commission accepts, that the rates applicable to network service will be determined in accordance with the outcome of the Docket Nos. ER93-465-000 *et al.* Rate Case. The Initial Decision in that case found that "for reasons of administrative and judicial economy," the ID would not determine which customer facilities were entitled to credits in view of the pendency of the same issue in this case. *Florida Power & Light Co.,* Initial Decision on Comparability and Other Rate Issues, 73 FERC ¶ 63,018, Docket Nos. ER93-465-000 *et al.,* slip op. at 51 (Dec. 13, 1995). In this situation, where the Presiding Law Judge in the Rate Case relied on the outcome of this case to determine which of FMPA and its members' facilities were entitled to credits, and where the rates in this case are dependent upon

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(August 12, 1994). This book contains full supporting documentation. *See also* the Third Affidavit of Albert B. Malmsjo, pp. 1-3 (Protest, App. G); the Fourth Affidavit of Albert B. Malmsjo, pp. 6-7 (Protest, App. J); the Fifth Affidavit of Albert B. Malmsjo, pp. 1-5 (Protest, App. L); Joe N. Linxwiler's Memorandum (July 1, 1994 Conditional Response, App. 3); the Fifth Affidavit of Albert B. Malmsjo, pp. 1-5 (Conditional Response, App. 4); and the Affidavit of Joe N. Linxwiler, Jr., pp. 4, 6-7 (Application for Rehearing, June 13, 1994, Corrected Version, App. 2). FMPA's June 13, 1994 Application also contains the Third and Fourth Affidavits of Mr. Malmsjo.

the rates established in the rate case, there is a perfect circle. Under the circumstances, the Commission should have the benefit of the record developed in the Rate Case. Thus, as a threshold matter, the Commission should examine that record in ruling on this rehearing application.[6]

The Commission has the authority, and in this context has the responsibility, to consider in this proceeding the evidentiary record developed in Docket No. ER93-465-000. FPL was, of course, a full and active participant in that proceeding. It can hardly claim prejudice if the Commission acts to ensure that the two proceedings have consistent outcomes, based on full consideration of the available evidence.

> It is to be recalled that ... the appellees ... were parties to both proceedings; were represented at all of the hearings, which were conducted at substantially the same times and places; and were given full opportunity to present all evidence they considered pertinent, to cross-

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[6] Alternatively, because the Rate Case is before the Commission for review, the Commission could defer the issue to decision in the Rate Case. However, this is a less preferred alternative, because it would bifurcate consideration of the issue and lead to unnecessary delay. It is well established that the Commission may notice its own files (and the records in related cases before it) in making decisions.

> examine witnesses and otherwise to protect their interests. Moreover, large portions of the evidence applied as much to one application as to another. ... In these circumstances it is difficult to see how appellees could have sustained substantial prejudice from the Commission's consideration of the evidence upon matters as closely related as those in issue in these two proceedings.

United States v. Pierce Auto Freight Lines, Inc., 327 U.S. 515, 528 (1946) (ICC entitled to consider both records in deciding parallel proceedings to institute new "through" services, to be substituted for prior concatenated point-to-point services). *See also Market St. Ry. v. Railroad Comm'n of California,* 324 U.S. 548, 562 (1945) (in acting to reduce rates, state commission entitled to rely on regulated company's representations made to the commission outside of the rate proceeding).

Under the Administrative Procedure Act, the Commission "may take official notice of facts which are capable of verification and those contained in reports and records in its files so long as the parties are permitted to argue for a contrary interpretation of the facts." *Iroquois Gas Transmission Sys., L.P.*, 53 FERC ¶ 61,194, at 61,690 & n.56 (1990) (Commission entitled to rely on evidence in other

dockets regarding the extent of competing gas transmission systems, as it has also done in deciding issues of cost equalization among integrated electric systems); *see also Wisconsin v. Federal Power Comm'n,* 201 F.2d 183, 186 (D.C. Cir. 1952), *cert. denied,* 345 U.S. 934 (1953). (In proceeding to require rate filing under FPA § 205, Commission properly relied upon record of related FPA § 203 acquisition application.) Here, the Commission's earlier statement that it would rely on Docket No. ER93-465-000 *et al.* in deciding rate issues herein provided ample notice that those dockets would afford parties the opportunity to prove whether or not FMPA should receive investment credits. FPL fully availed itself of that opportunity by sponsoring extensive testimony arguing that Florida Cities' facilities should not be credited. [7]

FMPA's July 15, 1995 motion herein sought to ensure consistency in the record basis for, and outcome of, the Commission's determinations of which FPL and FMPA facilities comprise the integrated grid. It sought to bring the record in this proceeding up to date with regard to relevant evidence (*e.g.,* FPL's representations in its Lake Worth acquisition effort) that came into existence after the due date

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[7] See the prefiled and live FPL testimony identified in FMPA's "Motion to Incorporate Record ...," filed herein on July 15, 1995. Moreover, a rehearing order would provide FPL yet another opportunity to confront that evidence. That opportunity alone would suffice to satisfy the APA § 556(e) requirement that parties have the "opportunity to show the contrary" upon "timely request" where an agency signals that it may rely upon adjudicative facts developed in another proceeding. *Iroquois,* 53 FERC at 61,690.

for protests to FPL's compliance filing. It sought to supplement a paper record with evidence tested in the crucible of live cross-examination. By denying that motion, the Commission risks producing (and absent reversal of the Initial Decision in Docket No. ER93-465-000 on transmission functionalization, will produce) an end result that is the antithesis of comparable treatment. The Commission's obligations to combat discrimination, to consider antitrust policy, and to take a hard look at relevant factors require that the evidence in both proceedings that bears on the rate treatment of FMPA's facilities and of FPL's specific-use facilities be considered together.

B. The Carrying Costs and Expenses for Certain Facilities are Especially Entitled to Credits

1. **The Ft. Pierce-Vero Beach line.** Both the Ft. Pierce-Vero Beach line for which Florida Cities claim credit, and other Ft. Pierce-Vero Beach transmission as well, are tied to and run directly parallel to FPL's facilities. As the Rate Case record and the record in this case show, the line is physically completely integrated with FPL transmission and is interconnected with FPL's transmission system at two different points. FC-67/14-15; FC-69 (Fort Pierce and Vero Beach sections);[8] and in this record, Affidavit of Joe N. Linxwiler, Jr. on behalf of FMPA, pp. 3-4, 6 (App. 2 to "Application by FMPA for Rehearing and Clarification,"

[8] The record in the Rate Case is consistently cited as above with FC-1 or FPL-1 indicating a Florida Cities or FPL exhibit number (Exhibit 1 in this example), followed by exhibit page numbers and line numbers, if needed.

Corrected Version, June 13, 1994)[9]; Memorandum of Joe N. Linxwiler, Jr., pp. 2-3 (App. 3 to "Conditional Response on Behalf of Florida Municipal Power Agency," July 1, 1994).[10]

There is no question that the Ft. Pierce-Vero Beach line meets all requirements of being physically integrated with the FPL transmission network and that it performs a transmission function both for FMPA and for FPL. The only question is whether under the Commission's standards the

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[9] Mr. Linxwiler attests: "[T]he lines connected to the high-voltage (69 kV) bus at Vero Beach's generating station go directly to three different substations, from which additional lines complete several interconnecting loops, forming a rather extensive 69 kV grid. This 69 kV grid is connected to FPL's 138 kV Malabar-Ft. Pierce line and to the 138 kV Vero Beach-Ft. Pierce line (which itself is also tied to FPL's Malabar-Ft. Pierce line at the Emerson substation). Similarly, Ft. Pierce's generation ties directly to a 69 kV grid that is, in turn, interconnected with FPL's 138 kV system at two different points....Ft. Pierce and Vero Beach are directly interconnected through a jointly owned 138 kV line. This line is tied to, and runs in parallel with, FPL's 138 kV facilities. In addition, as mentioned previously, the Ft. Pierce and Vero Beach systems are tied to FPL's 138 kV facilities at other points. Hence, the Ft. Pierce and Vero Beach systems are closely integrated with each other and with FPL's facilities. The Ft. Pierce and Vero Beach systems form interlocking loops with FPL's facilities providing for multiple paths for power flows in various directions for all parties. The 69 kV grids of Ft. Pierce and Vero Beach are in parallel to the 138 kV facilities and provide support for the 138 kV lines." *Id.* at 4, 6.

[10] Appendix C to the Protest of the Florida Municipal Power Agency to Florida Power & Light Co.'s Compliance Filing contains complete documentation of all of the FMPA and member transmission that would be entitled to credits, including Ft. Pierce, Vero Beach, Lake Worth and Key West.

line is of sufficient benefit to FPL to provide more than "unneeded redundancy." Jan. 5, 1996 Order, slip op. at 14. The Commission cites as a test whether customer-owned transmission is used for transmission of FPL power to "provide transmission service to FMPA or any other party...or to [FPL's] non-FMPA customers." *Id.* at 13. The record shows that the Ft. Pierce-Vero Beach line meets this standard.

Historically, Ft. Pierce-Vero Beach transmission facilities, even before they were extended and upgraded from 69 kV to 138 kV, "permitted FPL to serve FPL's own customers during transmission outages." FC-176/28. Testimony in this case confirms direct benefit to FPL:

> A recent example of the use of IDO Project transmission facilities as an alternate path to serve FPL native load occurred on February 2, 1994. FPL removed a 138 kV transmission line at their Oslo Road Substation from service for repair. During this outage period approximately 30 MW of additional power flowed from the FPL transmission facilities over the Ft. Pierce and Vero Beach 138 kV transmission facilities and back to the FPL facilities to serve FPL's native load customers.

Fourth Affidavit of Albert B. Malmsjo, p. 6, ¶17 ("Application by FMPA for Rehearing and Clarification," Corrected Version, App. 3 (June 13, 1994)); for further details in rebuttal to FPL, *see* Fifth Affidavit of Albert B.

Malmsjo, pp. 2-4 ("Conditional Response of Florida Municipal Power Agency," App. 4 (July 1, 1994)).[11] Moreover, although FPL may term its power flows on the Ft. Pierce-Vero Beach line as "inadvertent" (FC-178; *but see*, FC-176/28), FPL has fully loaded its transmission to enable it to increase its power imports from Georgia, thereby of necessity creating power flows over the Ft. Pierce-Vero Beach transmission and, incidentally, constraining transmission for FMPA and others. FC-54/140-41; FC-176/44.[12] The availability of the Ft. Pierce-Vero Beach transmission effectively increases grid capacity to the benefit of FPL. *See* FC-54:140-46; FC-57-59; FC-67/14-17; FC-176/15-16, 28-29; FC-180; Tr. 6991-93. The Ft. Pierce-Vero Beach line provides area transmission capacity. FC-54/151-

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[11] These Affidavits are also Apps. J and L to FMPA's Protest to FPL's Compliance Filing, *supra.*

[12] The "primary purpose" of the FPL-Georgia Power ties was to permit the importation of inexpensive power from Georgia to displace FPL's oil-fired generation. FC-181/Waters PSC testimony at 13ff. *Accord,* FC-181, generally; FC-57-59. FPL admits that it has planned its generation and transmission jointly and that the Georgia ties were built to enable it to get less expensive power from Georgia in substitution for more expensive power in Florida, but with increased transmission costs. FPL-1/10-12. *See also,* FC-54/138,140-42; FC-70/26; FPL-1/12:4-8; FC-54/138:17-20. Indeed, FPL has said that the Georgia-Florida ties are "like a generator" in the sense that "it gives [us] access to generation." Tr. 7012. Under the circumstances, where transmission in Florida was fully loaded to permit to FPL to import power from Georgia in aid of its generation and sales functions, but to the detriment to other transmission users, recognition of the benefits to FPL of having the Ft. Pierce-Vero Beach transmission are especially appropriate.

52; FC-70/70; FC-176/15-16, 28-29. Undoubtedly, such transmission affects FPL planning. Tr. 7000-01.

The Transmission System Breaker Diagram, FC-179, which includes the Ft. Pierce-Vero Beach facility, confirms the integral and necessary nature of this line to both FMPA and FPL transmission service. In addition to providing parallel paths which enable FPL to reliably serve its retail customers and to absorb excess power flows from other FPL transmission, the Ft. Pierce-Vero Beach line provides FPL with other benefits as well. Applying the Commission's test, the line can be and has been used to enable FPL to sell wholesale power of various kinds to Ft. Pierce and Vero Beach, although FPL's PR sales have ended because of FPL's excessive wholesale power rates. The fact that Ft. Pierce and Vero Beach currently are not purchasing tariffed wholesale power does not gainsay that the cities' transmission may be used by FPL to make wholesale power sales and is used by FPL to make interchange and other power sales to the cities.

The transmission is also necessary for Ft. Pierce and Vero Beach to use their generation to support the transmission network, as is required by all network tariffs under consideration, including FPL's recently filed transmission tariff in Docket No. ER96-417-000 and including the NOPR. Fourth Affidavit of Albert B. Malmsjo at 6-7, ¶¶16-17, 19 ("Protest of the Florida Municipal Power Agency..,." App. 5 (August 12, 1994)); *pro forma* NOPR Network Transmission Tariff §§3.4, 9.2; FC-94/10.2; FPL-180/10.2; C-347/4 §10.2. Ft. Pierce and Vero Beach and FMPA also use the Ft. Pierce-Vero Beach transmission to allow for interchange, including maintenance and emergency

power; to permit load shedding; and to provide reactive power, when necessary, on the same basis as FPL's generation. FC-70/6-7; FC-176/15-16, 28-29, 32; Tr. 7003-06, 7008, 7023-27; FC-54/153; 7286-90; 7845-46. Fourth Affidavit of Albert B. Malmsjo, *supra,* p. 6-7, ¶19. Florida Cities, including Ft. Pierce and Vero Beach, "can and do shed up to 50% or more of their load...at times of potential system emergencies." FC-176/16. Although some of these factors may not qualify the line for credits in isolation, in combination they demonstrate that the line is integral to and provides support for the transmission network.

Implementation of network transmission availability is central to comparability and, more broadly, to avoiding undue discrimination under the Federal Power Act. Such implementation is burdened, and may often become impossible, if customers cannot receive recognition on the same basis as transmission owners for their transmission investments in the grid. Denial of credits for the Ft. Pierce-Vero Beach line would be a decision that virtually no customer lines would ever qualify and that customers need not apply. If no other customer-owned line qualifies, the Ft. Pierce-Vero Beach line does qualify for credits.

2. The Lake Worth Line. The Commission denies FMPA credits for the Lake Worth Line. It specifically denies FMPA's motion to lodge the FPL proposal to buy the Lake Worth Utility system. Jan. 5, 1996 Order, slip op. at 7. By both denying FMPA's Motion to Lodge and denying supplementation of the record to include evidence from the Rate Case, the Commission denies itself the ability to consider the crediting implications of FPL's proposal to buy

the Lake Worth system.[13] The Commission does not allow credits for Florida Cities' transmission primarily on the grounds that such transmission is not integrated with the FPL transmission network and does not benefit FPL. *Id.*. at 12-15. In its proposal FPL offered to purchase the Lake Worth transmission and proposed "the integration of the Electric System into FPL's system." FC-71/5. FPL is express as to its intent "to operate the [Lake Worth] Electric System as an *integral part* of FPL's electric system." FC-176/30 (emphasis added), quoting FC-71/5.

FPL cannot deny that if it bought the Lake Worth system, it would include that system in its rate base. FC-176/29-30. The Lake Worth transmission ties generation directly to the 138 kV transmission that ties Lake Worth to FPL. Affidavit of Joe N. Linxwiler, *supra,* p. 4.[14] FPL currently benefits from the Lake Worth generation and can continue to do so, using the Lake Worth-owned transmission facilities. There is no less integration of Lake Worth transmission or benefit to FPL from that transmission for system support merely because the systems are separately

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[13] This information could not have been supplied with FMPA's Brief because the buy-out proposal was not made until September 1, 1994, after the June 10, 1994 date when the briefs and applications for rehearing were filed in this case.

[14] "Lake Worth has a backbone 138 kV system which, among other things, interconnects Lake Worth's main generation plant with FPL's 138 kV facilities at the Hypoluxo substation. Lake Worth is expanding its 138 kV system." *Id.* at 6. *Accord,* "Memorandum," *supra,* p. 4 (App. 3 to "Conditional Response").

owned and because the benefits of integration come through network operating and coordination arrangements. FC-176/30:14-16; 7004-06, 7008, 7845-50. It would be anticompetitive in the extreme to say that a city can get rate recognition for facilities if, and only if, it sells its system to FPL.

Again, under the network integration agreements, Florida Cities are obligated to operate their generation in support of the transmission network. *See, e.g., pro forma* Network Transmission Tariff §§3.4, 9.2. As FPL admits, through its interchange agreements FPL can now get benefits from the availability of Lake Worth generation, ultimately including a reduction in the need for generation and transmission on its own system. Tr. 7845-49. In a situation where FPL specifically recognizes a benefit if it owns customer generation and connecting transmission, it cannot be said that no such benefits exist if Lake Worth continues to own the generation and transmission. Such a result would make benefits depend solely on ownership, not function. Moreover, the economic consequence of recognizing the Lake Worth line as part of the grid if and only if Lake Worth sells its system to FPL is to force mergers and their attendant reduction in competition as the means to achieve system integration.

3. Key West. Key West and the Florida Keys Electric Cooperative own looped transmission between the FPL transmission system across the Florida Keys and to the City Electric System of the City of Key West. Among other things, these transmission facilities permit FPL to sell power to Key West and to benefit from Key West generation.

Affidavit of Joe N. Linxwiler, *supra,* at 4, ¶¶5(c)(2), 6(a)(c); Memorandum, *supra,* at 4. The City of Key West is currently buying approximately 50 mw of firm power from FPL under a long-term contract.[15] A Commission test for system entitlement to credits is whether the transmission facilities in question are used by FPL "to provide transmission service to FMPA or any other party." Jan. 5, 1996 Order, slip op. at 13. Clearly, the Key West transmission between FPL's facilities and Key West enables FPL to transmit power for sale to Key West. If Key West had not built the facilities, FPL would have had to. Otherwise, it could not have transacted with Key West and the FKEC. The January 5, 1996 Order states:

> While the FMPA facilities may serve a transmission function on the FMPA side of the interconnection point between FMPA and the Florida Power system, they are not used by Florida Power to provide transmission service to FMPA or any other party. Nor are they used to transmit Florida Power's power to its non-FMPA customers.

Jan. 5, 1996 Order at 13. It is plain that the Key West transmission is used to allow "Florida Power to provide

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[15] FMPA believes that this contract is the result of economic coercion. While FPL was denying network transmission for Key West (which had signed IDO contracts), thereby knowingly making implementation of the IDO contracts impossible, FPL entered into the FPL-Key West contract, the next best alternative for Key West. FMPA reserves its rights to challenge the legality of this contract.

transmission service to FMPA or any other party" (*i.e.*, the Florida Keys Electric Cooperative) and that it is used "to transmit Florida Power's power" to Key West.

Although Key West is a member of IDO, as long as the FPL-Key West power contract remains in effect, that power will use Key West transmission to the benefit of FPL. In addition, such facilities permit Key West to use its generation to help support the transmission network, among other things, through the generation and sale of emergency and maintenance power, through load shedding and, more generally, through making power available to the benefit of FPL. Fourth Affidavit of Albert B. Malmsjo, *supra,* pp. 6-7, ¶19.

IV. The Decision in this Case must be Harmonized with the Decision in the Rate Case.

It almost goes without saying that for there to be non-discrimination and comparability, as well as just and reasonable rates, and also to avoid anticompetitive impacts, the same standards must be used to define the transmission system for crediting as are used to determine FPL's rate base in setting FPL's transmission rates. In its January 5, 1996 Order at 7, the Commission states:

> In Footnote 32 of the Final Order, we referred to FMPA's and Florida Power's agreement that cost-of-service issues not raised in this proceeding will be resolved in the Rate Case, and we stated that if we further modify cost-of-service principles in that docket, Florida

> Power will make conforming changes to the service provided in this proceeding....

In combination with footnote 48 at page 13 of the Jan. 5, 1996 Order, this language supports the conclusion, that FMPA requests that the Commission confirm, that the determination of FPL's rate base will follow the same principles for inclusion or exclusion as are applied in determining whether FMPA's transmission facilities qualify for credits. To be more specific, FMPA requests that the Commission confirm that in rate cases, facilities which are used primarily for the FPL generation function or primarily to deliver power to retail loads, as opposed to backbone facilities, will be excluded from the grid.

* * * *

VI. The Commission Should Clarify that FMPA May Take Network Service

On page 29, footnote 103 of the January 5, 1996 Order, the Commission states that "an order directing transmission service under Section 211 would not abrogate any existing transmission agreements." It continues, "any charges under such agreement that are not based on usage would continue to be payable even if no transmission service was scheduled under such an agreement." FMPA interprets this footnote to say that pre-existing transmission agreements are not made automatically ineffective by a filing for network service. Of course, agreements may permit changes to allow for network (or other) service. Companies may be under pre-existing obligations to provide network or other transmission service, or parties may have independent rights to such

service consistent with a §211 application.

FMPA does have existing transmission service agreements with FPL to transmit power from generation sources to points of delivery, for example, the St. Lucie and Stanton Transmission agreements. In this case, the Commission has found that such transmission service agreements "pose no §211(c)(2) bar to our ordering of wheeling." "Order Noting and Granting Interventions; Proposed Order Directing Network Transmission Services; and Establishing Further Procedures," 65 FERC ¶ 61,125, at 61,614 (1993). FPL has committed to substitute network service for the existing point-to-point service upon FMPA's request. *Id.* at 61,607. *See also* letter from Steven J. Ross, Counsel for Florida Power & Light Company, to Lois D. Cashell, Secretary, Federal Energy Regulatory Commission, at 5 (July 11, 1994) (transmitting FPL compliance filing in Docket No. TX93-4-000). Further, the NRC St. Lucie Antitrust Conditions to which FPL agreed to be bound specifically state, FPL shall provide transmission "between two or among more than two neighboring entities, or sections of a neighboring entity's system which are geographically separated...." License Condition X(a). By their own terms, the transmission service agreements allow for modification (*e.g.*, to provide for network service) and contain non-waiver clauses. *See* discussion at 65 FERC at 61,603-04 and references to the Florida Municipal Power Agency Application contained therein. FMPA does not here set forth the arguments on this issue, but relies upon its earlier pleadings and the Commission's previous rulings, as well as on FPL's commitments. However, to avoid subsequent confusion, footnote 103 of the Commission's January 5, 1996

Order should be clarified. If the Commission had held that it would be appropriate for FPL to continue charging under the existing TSAs, while also charging for transmission of the same resources to the same loads, then FMPA would seek rehearing of the termination of Docket No. EL93-51. The basis for this conditional rehearing request is that continued charging under the TSAs would violate FPL's agreements to abide by the NRC Antitrust License Conditions and would result in anticompetitive, discriminatory and non-comparable treatment.

CONCLUSION

FMPA respectfully requests that the Commission grant rehearing of its January 5, 1996 Order, as discussed above. FMPA believes that the purposes of network service are better served if the Commission adopts a more inclusive definition of the transmission network. Even if it does not adopt such a definition, FMPA requests that the Commission take into account the record in Docket No. ER93-465-000, which fully supports granting FMPA credits under the standards announced the Commission's January 5, 1996 Order. The Commission should grant credits for at least the Fort Pierce-Vero Beach line, the Lake Worth line and the Key West lines.

If the Commission adheres to its January 5, 1996 Order on crediting, in order to achieve comparability and to avoid discrimination, FMPA respectfully requests that the Commission clarify that FMPA need not include in its load ratio share that level of load which is served from local generation, where the FPL transmission system is not used, or

which is served by other generation, or where FMPA pays FPL's applicable point-to-point transmission rates. Also, to achieve comparability and non-discrimination, FMPA requests that the Commission clarify that in FPL's transmission Rate Case, Docket No. ER93-465-000, the Commission will determine FPL's transmission rate base in accordance with the principles adopted for crediting in the January 5, 1996 Order.

FMPA requests that the Commission rule that in ordering revenue credits, it did not intend that FPL would have to credit revenues when it sells power from a plant to a load, when both are located off the FPL transmission network.

Finally, FMPA requests that the Commission make clear that it is not saying that if FMPA takes network service, double charges would be payable under existing point-to-point transmission schedules.

Respectfully submitted,

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February 5, 1996

CERTIFICATE OF SERVICE

I hereby certify that I have on this 5th day of February, 1996, caused the foregoing request to be delivered by hand and sent by first class mail to all parties on the list compiled by the Secretary of the Commission in this proceeding.

_____

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APPENDIX I

FLORIDA MUNICIPAL POWER AGENCY'S RESPONSE TO COMMISSION'S APRIL 2, 2001 ORDER TO DETERMINE MOOTNESS

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Florida Municipal Power Agency v. Florida Power & Light Company	Docket No. TX93-4-004 and EL93-51-003

FLORIDA MUNICIPAL POWER AGENCY'S RESPONSE TO COMMISSION'S APRIL 2, 2001 ORDER TO DETERMINE MOOTNESS

INTRODUCTION AND SUMMARY

On April 2, 2001, the Commission issued an Order to Determine Mootness in Docket Nos. TX93-4-004 and EL93-51-000. The Order states (slip op. at 1, footnote omitted):

> The Commission believes that the rehearing and clarification requests filed in this proceeding may have become moot as a result of Order No. 888, the settlement approved by the Commission in Florida Power & Light Company, 92 FERC ¶ 61,241 (2000), other Commission disposition of the issues, or changed circumstances.

It invites parties to file comments "why the Commission should not terminate these proceedings as moot" (slip op. at 2).

Although certain subsidiary issues have been raised in rehearing and reconsideration requests that have become moot (*see* Section I.A, *infra*), the core issue in this proceeding must be considered and decided. This issue is whether FMPA is entitled to have its transmission and that of its member cities recognized as part of the transmission grid and credited or otherwise valued, when FMPA's transmission is comparable to FPL's transmission that is included in FPL's rate base. (Throughout this pleading, we refer to FMPA and FMPA transmission as including FMPA's applicable members and members' transmission.)

The question of equal treatment for customer-owned transmission is raised both in TX93-4/EL93-51 and in Docket No. ER93-465 *et al.,* the now partially settled Florida Power & Light rate case. The Settlement Agreement in Docket No. ER93-465 *et al.* reserved these customer transmission issues and does not settle the TX93-4/EL93-51 credits (and related) issues:

> IV. FMPA RESERVED ISSUES
>
> A. This Settlement Agreement does not resolve (or provide any refunds or rate adjustment attributable to resolving) the question of whether FMPA is entitled to refunds in connection with the network transmission service it purchases from FPL as a result of claims that FMPA has made for (i) credits for customer-owned transmission facilities, (ii) treatment of behind-the-meter generation and associated load, and (iii) exclusion from FPL's

transmission rates of the costs of facilities that under the appropriate standard should not be considered part of FPL's integrated transmission system (other than generator step-up transformers (GSUs) and conductors from generation to GSUs, the costs of which will be deemed to have been excluded from FPL's transmission rates for refund and going-forward rate purposes). Collectively, these issues are referred to as the "FMPA Reserved Issues."

B. Impact on dockets where the FMPA Reserved Issues may be at issue:

1. TX93-4 remains wholly unaffected by this Settlement Agreement.

March 3, 2000 Settlement Agreement, Part IV. Thus, these issues were not settled and cannot be deemed moot.

Florida Municipal Power Agency v. Florida Power & Light Company, Docket Nos. TX93-4 and EL93-51, is a complaint proceeding that had been brought by FMPA to require FPL to sell transmission services on a network basis. At issue are the terms for network service, including the treatment that is to be afforded FMPA's transmission.[1]

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[1] Technically, Docket No. EL93-51 was terminated (with a challenge to that termination pending on rehearing), but the Docket has been continuously referred to in Commission orders nonetheless. *FMPA v. FPL*, 74 F.E.R.C. ¶ 61,006, at 61,008 n.40 and 61,024 (1996).

Florida Power & Light Company, Docket No. ER93-465 *et al.,* is a consolidated case that includes multiple dockets. These dockets include rate, tariff, and contract (including service agreement) filings. They cover FPL's sales of transmission and other services, including the rates, terms, and conditions applicable to network transmission service. FMPA claims entitlements to refunds for transmission overcharges because of FPL refusals to give credit for or recognize the value of FMPA transmission. In Docket No. ER93-465 *et al.*, FMPA is a member of Florida Cities, which includes FMPA and many of its members.

FMPA (and its member cities) own transmission facilities in Florida. FMPA has contended in both these TX93-4/EL93-51 proceedings and the ER93-465 *et al.* proceedings that its transmission investments, which are part of the applicable network over which network transmission service is provided, must be recognized for rate purposes on a comparable basis with FPL's facilities. Specifically, FMPA has said that to the extent that the grid is defined to include FMPA's loads, where both FPL and FMPA transmission is necessary to serve those loads, FMPA transmission must be recognized and credited applying the same standards that are used to determine whether FPL transmission forms part of the transmission rate base. Alternatively, it has said that to the extent FMPA's transmission serves FMPA's load (without using FPL transmission), but FMPA's transmission is treated as not being part of the transmission grid and its costs are not credited against transmission rates, the load served exclusively using FMPA's transmission must be excluded from network load. Otherwise, FPL would collect transmission revenues for serving load which is beyond the

FPL transmission grid and which is supplied using others' transmission. As a third option, the Commission could reduce the FPL rate base to be consistent with a disallowance of an inclusion of FMPA facilities that are necessary to connect generation and load.

On April 17, 2000, FPL filed a Settlement Agreement in the FPL rate case docket and numerous other dockets, including Docket No. ER93-465, *but not including the FMPA Complaint Dockets, TX93-4 and EL93-51.* These TX93-4/EL93-51 dockets were not settled. The Dockets that were included in the Settlement are ER93-465, ER93-507, ER93-922, EL93-28, EL93-40, EL94-12, EL94-28, EL94-47, OA96-39, ER96-2381, ER96-417, ER96-1375, OA97-245, ER99-723, ER99-2770, EL99-69, EL00-13, DR98-24. *Florida Power & Light Co.*, 92 F.E.R.C. ¶ 61,241, at 61,765 (2000).[2]

The settlement agreement specifically left open certain reserved issues, including (1) whether Florida Cities' (including FMPA) transmission, which is comparable to FPL transmission that is included in FPL's rate base, should be recognized as part of the FPL transmission grid for

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[2] Sub-dockets ER93-465-000, ER96-417-000 and ER96-1375-000 include issues that were reserved under the Settlement Agreement and are not terminated as to those matters. Docket No. OA96-39-000 is not terminated as to the settlement agreement that was filed December 10, 1998 and is pending before the Commission and to the extent that FMPA is entitled to refunds for the FMPA Reserved Issues under the Settlement Agreement. Docket No. OA97-245 is terminated in part by the Settlement Agreement. The refund report filed March 28, 2000 in Docket No. ER99-723-002 is not addressed by the Settlement Agreement.

transmission rate-making purposes, (2) whether Florida Cities (including FMPA) are entitled to credits for their transmission that is comparable to FPL rate base transmission or, alternatively, whether Florida Cities are entitled to exclude load from network load which is served without using FPL transmission, and (3) whether FPL's settlement rate base is consistent with a disallowance of credits (FMPA Reserved Issues).[3] The Commission approved the Settlement by Order in *Florida Power & Light Company*, Docket No. ER93-465 *et al.*, 92 F.E.R.C. ¶ 61,241 (2000).

The Commission's question concerning mootness was issued in Docket Nos. TX93-4 and EL93-51, which are only two of the Dockets in which the FMPA credits issues arise. Although the Commission's question could be viewed as strictly procedural, that is whether the FMPA Reserved Issues should be decided in the TX93-4/EL93-51 Docket as opposed to some other Docket, a question which is addressed in Section II of this pleading below, from the context of how the Commission raises the issue, the Commission appears to be asking the substantive questions whether it has already finally decided the FMPA credits issue adversely to FMPA and whether the issue is therefore moot in all dockets.

The FMPA Reserved Issues are not moot because FMPA raises serious factual and legal issues that have direct

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[3] *See* Comments of Florida Cities on Settlement and Request for Resolution of Reserved Issues, and May 9, 2000 Letter to Hon. David P. Boergers, filed in both these dockets and in ER93-465 *et al.* The Comments discuss the reserved issues and their need for resolution.

consequences to itself, to FPL and, most importantly, to the public. Further, as FMPA explains below, FMPA's requested relief is consistent with prior Commission decisions. Moreover, the position FMPA takes in these dockets — that in setting network transmission rates the FERC cannot ignore or discriminatorily devalue smaller systems' transmission — is consistent with the core of the Commission's statutory obligations. Federal Power Act, Sections 205-206, 211-212, 16 U.S.C. §§ 824d, e, j, k. *See Gulf States Utils. Co. v. FPC*, 411 U.S. 747 (1973).

Proper decision in this case is central to the Commission's objective of establishing workable competitive markets. To achieve this objective, dominant transmission owners must not be permitted to discriminate against smaller transmission owners and transmission dependent systems, such as FMPA. Put most simply, municipal transmission counts. If FERC decides the issue raised in this docket incorrectly, FERC will have gotten network transmission pricing wrong and will thereby unduly burden competition as well as smaller market participants.

The Commission asks specifically whether the rate case settlement in Docket No. ER93-465 *et al.* moots the FMPA credits and related issues. The rate case settlement does not settle the TX93-4/EL93-51 docket, recognizing that the FMPA Reserved Issues are open issues. Settlement Agreement, § IV.B.1 at 6 and § IV.C at 7. *See also Florida Power & Light Co.*, Docket No. ER93-465 *et al.*, 92 F.E.R.C. at 61,765-66.

Moreover, in the rate case settlement, the parties agree that FPL has not adjusted its transmission rate base to

exclude facilities that are comparable to those of Florida Cities. The Settlement Agreement provides specifically that it does not "provide any refunds or rate adjustment attributable to" FMPA claims for "exclusion from FPL's transmission rates of the costs of facilities that under the appropriate standard should not be considered part of FPL's integrated transmission system . . . ." Settlement Agreement, Part IV.A ("FMPA Reserved Issues"). *See id.* at 5-6. *Accord, Florida Power & Light Co.*, Docket No. ER93-465 *et al.*, April 17, 2000 Letter from Steven J. Ross, Esq. to Honorable David P. Boergers at 9 ("Filing Letter"). Thus, *the Parties to the Settlement made it a specific part of the parties' bargain that FPL's rate base has not yet been adjusted to apply principles that would be consistent with excluding Florida Cities' transmission investment from the grid and thereby with denying Florida Cities credits.* Whether Florida Cities (which include FMPA) are entitled to credits is part of the FMPA Reserved Issues, which FMPA is free to litigate herein.

Order No. 888[4] and the cases concerning credits, including TX93-4/EL93-51, require a comparable treatment

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[4] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, [1991-1996 Regs. Preambles] F.E.R.C. Stats. & Regs. ¶ 31,036 (1996), *clarified*, 76 F.E.R.C. ¶ 61,009 (1996), *modified*, Order No. 888-A, [1996-2000 Regs. Preambles] F.E.R.C. Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 F.E.R.C. ¶ 61,248 (1997), *aff'd in part and remanded in part sub nom. TAPS v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *petition for cert. granted sub nom. New York v. FERC*, No. 00-568 (U.S. Feb. 26, 2001), *order on reh'g*, Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998).

concerning transmission-provider and transmission-customer facilities. Where the parties in a settlement stipulate that the transmission-providers' rate base has not been adjusted to exclude facilities that are comparable to customer facilities, those customer facilities must receive credits. This issue has not been resolved and, therefore, cannot be considered moot. Further, more generally, FMPA's entitlement to credits for its transmission facilities, or, alternatively, FMPA's entitlement to a reduction of its load ratio share, or to an adjustment of FPL's rate base to achieve consistent treatment has not been resolved on rehearing and needs to be resolved.[5] Even applying the Commission's restrictive "integration" test, where FPL stipulates that there has been no adjustment to exclude any of its facilities (other than generator step-up transformers (GSUs) and conductors from generators to GSUs; *see* Section I.B, *infra*), the Commission must apply the integration test to customer-facilities, using the same standard. FMPA owns transmission facilities comparable to those FPL-owned facilities which it deems to be "integrated" and which FPL includes in its rate base.

Procedurally, the TX93-4/EL93-51 Docket is the application and complaint docket, which sets the standards under which FMPA is entitled to receive network transmission, including its entitlements to credits. After the Commission ordered FPL to provide network service in

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[5] Because the parties have stipulated to a rate base, but one which is admittedly non-comparable, an ordering of credits would be preferable. With limited exceptions that are specified in the Settlement Agreement, FPL includes all 69 kv and above facilities in its rate base. Credits should be allowed for FMPA's facilities on a comparable basis.

TX93-4/EL93-51, FMPA began network service. FMPA takes service under a generally applicable transmission tariff and an implementing bilateral Network Service Agreement (NSA). The tariff was initially filed as a stand-alone "T-4" network service tariff in Docket No. ER96-417, and was then superseded by an Order No. 888-based OATT initially filed in Docket No. OA96-39. In both of these dockets, the tariff rate for network service was made subject to the outcome of Docket Nos. ER93-465 *et al.* The NSA was initially dated March 6, 1996 and filed in Docket No. ER96-1375 (providing for service to loads in Jacksonville Beach, Green Cove Springs, and Clewiston). It was then serially amended in the following Dockets:

- OA96-39 (first amendment, intended to conform NSA to OATT);
- ER97-4637 (second amendment, adding Vero Beach load);
- ER98-788 (third amendment, adding Starke load);
- ER98-1536 (fourth amendment, adding Fort Pierce load);
- ER98-2746 (fifth amendment, adding Key West load); and
- ER93-465 *et al.* (sixth amendment as part of the April 17, 2000 settlement filing).

Through all of these filings, the NSA (§ 6) has continued to provide that "the Service Agreement is not intended to [a]ffect the proceedings in Docket No. TX93-4-000 and EL93-51-000, and the decisions in those dockets may resolve certain outstanding issues regarding network service." Thus, a decision on the "FMPA Reserved Issues" left for litigated decision in the April 17, 2000 settlement will control refunds and rates under the above-listed dockets — whether it is reached in Docket No. ER93-465 *et al.*, in the other dockets captioned in the settlement agreement, or in the related Docket Nos. TX93-4/EL93-51 proceeding.

On January 21, 1999, FMPA filed in TX93-4/EL93-51 a Status Report and Unilateral Offer of Settlement, which would resolve the FMPA Reserved Issues in all dockets. This offer also constitutes an open matter. The settlement offer was never ruled upon or, apparently, considered by the Commission.

FMPA believes that the Commission should decide the FMPA Reserved Issues in Docket No. ER93-465 *et al.* and the same issues in TX93-4/EL93-51 together, but the Commission has not consolidated the cases.[6] The Commission has the option of deciding the cases together, although it could decide the FMPA Reserved Issues in ER93-465 *et al.* and apply the decision to the other dockets. TX93-

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[6] While the Commission has never denied a motion to consolidate, it declined a request to incorporate part of the record of ER93-465 into that of the consolidated TX93-4-002/EL93-51-002, stating that there was "no reason to supplement this record with evidence from the Rate Case." *FMPA v. FPL*, 74 F.E.R.C. at 61,007.

4/EL93-51 are the dockets that require FPL to provide network service. Decisions in any of the open dockets must be consistent with each other. *However, it is time to resolve these matters.* Such resolution is especially important because in the recently decided *GridFlorida RTO* proceeding, the Commission approved GridFlorida's application of a rate option based either on the "integration" test or making all FMPA facilities eligible for crediting, but applying a Phase-In. To make a reasoned and timely decision regarding the parties' position in GridFlorida, FMPA needs a ruling as to what facilities are eligible for credits under the applicable test, which is at issue here.

I. EXCEPT FOR LIMITED ISSUES, THIS CASE IS NOT MOOTED BY ORDER NOS. 888 AND 888-A, THE ER93-465 *ET AL.* SETTLEMENT APPROVAL, OTHER COMMISSION ORDERS OR OTHER DEVELOPMENTS

* * * * *

B. The Core, Related Issues of Rate Recognition for FMPA Transmission and Gross Load Network Service are Not Moot

Florida Cities and FMPA's core position that has been articulated both in these Dockets and in Docket Nos. ER93-465 *et al.* is that Florida Cities' transmission should be recognized as part of the FPL transmission grid *on the same basis* that FPL's transmission is recognized as part of the grid. Florida Cities seek comparability. If FPL transmission

that is *of the same nature* and *serving comparable functions* is included in FPL's rate base, then FMPA should receive credits for its similar facilities; if FPL transmission is excluded from rate base as not part of, or as not "used and useful" to, the applicable transmission grid, comparable Florida Cities' transmission should be excluded. Under the "integration" test comparable FPL and FMPA facilities cannot be treated differently and they either both must be considered integrated, or neither may be considered integrated.

FMPA has also contended that FPL should apply the same standard in determining FMPA's eligibility for credits and FPL's entitlement to charge FMPA for the use of FPL's network. If FMPA's transmission is deemed to be beyond the FPL transmission network and therefore ineligible for credits, then load which is served from FMPA's "behind-the-meter" generation using only FMPA's or others' transmission cannot be considered to "use" FPL transmission. FPL must apply a consistent definition of the transmission network that includes or excludes smaller system transmission consistently for purposes of determining company rate base, customer eligibility for credits and customer use of company transmission to serve load (*i.e.,* applicable network load). Dependent systems like FMPA cannot have their transmission and connected generation and loads considered to be beyond the grid for purposes of determining customer eligibility for credits, but have their transmission and connected generation and loads considered as within the grid for purposes of determining their use of that grid for ratemaking. If customer transmission, generation and loads are considered to be beyond FPL's grid for purposes of determining eligibility for credits, then the

same loads cannot be considered to be network loads on FPL's grid.

In its Order to Determine Mootness, the Commission refers to the ER93-465 settlement and Order Nos. 888 and 888-A as possibly giving rise to mootness. These FMPA Reserved Issues cannot be considered moot because of the settlement that, as is stated above, expressly reserves and does not settle the issues in question. Nor does Order No. 888 decide the matter. The essence of Order Nos. 888 and 888-A is that transmission-providers and their customers should stand in comparable positions in market competition. Neither should be preferred or discriminated against. It turns Order No. 888 on its head to use it as a basis to justify discriminating between transmission-providers and transmission dependent systems with respect to the treatment of transmission. Moreover, although Order No. 888 did set standards for customer credits, which limit the availability of such credits where customer transmission does not provide benefits to the transmission-provider, in Order No. 888 the Commission carefully states:

> We caution all transmission providers that while our discussion here addresses the requirements necessary for a customer's transmission facilities to become eligible for a credit, the principles of comparability compel us to apply the same standard to the transmission provider's facilities for rate determination purposes.

Order No. 888 at 31,743 n.452. Thus, in Order No. 888 the Commission directly tied any denial of credits to a comparable limitation on transmission-provider facilities that are included in rate base. Order No. 888 and 888-A provide no basis for a ruling either that this case is moot or that FMPA is not entitled to comparability with FPL.

Significantly, the Commission made parallel rulings in this case (which were cited in Order No. 888 at 31,742-43). In *Florida Municipal Power Agency v. Florida Power & Light Co.,* Docket Nos. TX93-4/EL93-51, 74 F.E.R.C. ¶ 61,006, at 61,007-11 (1996), the Commission accepted FPL's position that FMPA's transmission is not part of FPL's transmission grid. Therefore, it ruled that FMPA was not entitled to credits. However, *it also ruled that the same standards were to be applied in determining FPL's transmission rate base.* In holding, "[t]he integration of facilities into the plans or operations of a transmitting utility is the proper test for cost recognition" of customer-owned transmission facilities, the Commission was careful to state:

> This fundamental cost allocation concept applies to Florida Power [& Light] as well as FMPA. Just as FMPA cannot obtain credit for facilities not used by Florida Power [& Light] to provide service, so Florida Power [& Light] cannot charge FMPA for facilities not used to provide transmission service.

Id. at 61,010 & n.48.

FPL has not adjusted its transmission rate base to exclude facilities that are comparable to those of FMPA, as was necessary to justify a denial of credits. The Settlement Agreement does not:

> provide any refunds or rate adjustment attributable to [FMPA claims for]...exclusion from FPL's transmission rates of the costs of facilities that under the appropriate standard should not be considered part of FPL's integrated transmission system (other than generator step-up transformers (GSUs) and conductors from generators to GSUs, the costs of which will be deemed to have been excluded from FPL's transmission rates for refund and going-forward rate purposes).

Settlement Agreement, Part IV.A. Thus, in the settlement the parties bargained for the exclusion of GSU-related investment from FPL's rate base, *but it is a specific part of the parties' bargain that the rate base is not otherwise adjusted to apply principles that would be consistent with excluding FMPA's transmission investment from the grid and thereby consistent with denying FMPA credits. Under the "integration" test, facilities like those of FMPA are counted as integrated because they are owned by FPL and included in its rate base.*

Under these circumstances, FMPA submits that its entitlements to investment credits presents a live issue, which under the ER93-465 *et al.* settlement FMPA remains free to advocate. FPL includes all of its 69 kv facilities and above in

its rate base (except for GSUs and conductors from generators to GSUs) and charges other transmission users for them, including FMPA. Crediting FMPA facilities which are similar to those which are included in FPL's rate base is necessary to achieve comparability and to avoid discrimination.

To be sure, the Commission could follow the alternative of holding that FMPA's transmission and loads are beyond the FPL grid. Therefore, it could order a reduction of FMPA's network load that is served exclusively from customer-owned transmission. Although the Commission perceived technical difficulties in following this course in Order No. 888-A, since that time (and before) a number of companies have voluntarily agreed to sell contract demand network transmission, plainly demonstrating the feasibility of doing so. [7] The Commission admitted to the

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[7] Florida Power Corporation voluntarily agreed to sell FMPA network transmission on a contract demand basis. *Florida Power Corp.*, 81 F.E.R.C. ¶ 61,247 (1997). Pre-Order 888, Consumers Power (now Consumers Energy) Company sold network transmission on a contract demand basis under its cost-based filed rates to Michigan Public Power Agency and Wolverine Power Supply Cooperative, Inc. *See generally, Consumers Power (Energy) Co.*, Docket Nos. ER92-331 *et al.* The interconnection agreement between TAPS member Northern California Power Agency and Pacific Gas & Electric Co. (Rate Schedule PG&E No. 142) has always provided for a form of network transmission service for only that portion of NCPA's total load not already served by Western Area Power Administration contracts for both power and transmission. *See also Duke Power Co.*, Docket No. ER78-536 (October 6, 1978); *Carolina Power & Light Co.*, Docket No. ER93-655-000 (July 24, 1994); *Mississippi Power & Light Co.*, Docket No. ER82-531 (November 1, 1980); Agreement for Partial Requirements Resale Service and Transmission/ Distribution Service between Florida Power Corp. and

Court of Appeals in the Order No. 888 Appeal that the sale of network transmission on a contract demand basis is possible and noted it had accepted tariffs providing for such service. *Transmission Access Policy Study Group, et al. v. FERC*, D.C. Cir. Case No. 97-1715, Brief for Respondent Federal Energy Regulatory Commission (Feb. 16, 1999) at 103. Thus, there is no basis for the Commission to consider the full FMPA loads as using the FPL transmission (*i.e.*, network load), but to consider the customer-owned transmission that serves those loads as being beyond the grid for purposes of determining eligibility for customer credits. Even if this discrimination and preference could somehow be countenanced as a general matter, it would be far beyond the pale to do so where transmission-providers' facilities that are included in the rate base are comparable to customer' facilities that are denied credits.[8]

Thus, not only does the settlement not moot the issue, but Order No. 888 also does not. As is explained below, on rehearing, FMPA raises serious issues that must be decided. The dictates of Order No. 888 are that FPL's rate base had to be adjusted to ensure comparability, if FMPA were denied credits, but the Settlement Agreement expressly states that no adjustment was made (although the Commission could order an adjustment here). This creates a direct conflict between

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Reedy Creek Improvement District, FERC Rate Schedule 18.

[8] For example, it is pure fiction that FPL plans to serve that portion of Key West load that is served from local generation. FMPA, which serves Key West, is contractually obligated to maintain on-island generation. Key West is 90 miles from the FPL system.

prior Commission orders in this Docket and statutory requirements.

FMPA points out that the record in Docket Nos. TX93-4/EL93-51 and Docket No. ER93-465 shows that its transmission is just like that of FPL in terms of function and purpose.

> ... FMPA and member-owned transmission facilities in fact have the engineering characteristics such as they are grid facilities consistent with network transmission functions and FPL definitions ....[They] must be available to all traders to facilitate efficient electricity loads and generating units ...By any definition, the network would include transmission owned by FMPA or its member cities, which provides a vehicle for FPL (and others) to sell to a market that includes Florida Cities and for Florida Cities to participate in that market. Such [FMPA] transmission is electrically part of the grid, and if owned by FPL, would have undoubtedly been included in FPL's rate base.

E.g., Docket No. ER93-465, Exh. FC-54/151, 152, 154. *Accord,* FC-67/13-17; FC-68; FC-69; FC-70/6-8; FC-176/4-16, 21-25, 28-34. Docket No. TX93-4/EL93-51, Brief of FMPA on Rates, Terms and Conditions of Network Transmission Service to be Provided by FPL, filed Jan. 31, 1994, App. E (Second Affidavit of Albert B. Malmsjo) at ¶¶ 12, 14; Application by FMPA for Rehearing and Clarification, filed June 10, 1994, App. 2 (Affidavit of Joe N.

Linxwiler, Jr.) at ¶ 5, App. 3 (Fourth Affidavit of Albert B. Malmsjo) at ¶ 19, App. 4 (Third Affidavit of Albert B. Malmsjo) at ¶ 3; Protest of FMPA to FPL's Compliance Filing, filed Aug. 12, 1994, App. I (Affidavit of Nicholas P. Guarriello) at ¶¶ 5, 6.

An examination of the "Transmission System Breaker Diagrams" in Docket No. ER93-465 *et al.*, Florida Cities Exhibit 179, shows that the FPL transmission that is included in rate base is indistinguishable from the FMPA transmission that FPL claims is ineligible for credits. *See* Docket No. ER93-465, Brief on Exceptions of Florida Cities (Jan. 29, 1996) at 107-108 and references therein; Exh. FC-176/32-33; FC-179.[9] [10] Under the Settlement Agreement, FPL can include in its rate base facilities that it uses, for example, to serve the Florida Keys Electric Cooperative with wholesale

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[9] When FPL offered to buy the Lake Worth municipal system, the offer included payment to Lake Worth for city-owned transmission facilities that FPL considered to be ineligible for credits, but that it would include in its rate base, had FPL's acquisition offer been accepted. Exh. FC-176/30; FC-70/7; FC-71. It is plainly anticompetitive for a transmission monopolist to grant a smaller, dependent, competing system benefits if and only if it sells its system, but not otherwise. Sherman Antitrust Act § 2, 15 U.S.C. § 2; *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9 (D.D.C. 1999), 87 F. Supp. 2d 30 (D.D.C. 2000). Transmission usefulness is a matter of function, not legal title.

[10] An agency can, of course, notice evidence of record in its files in substantively related proceedings involving the same parties. *United States v. Pierce Auto Freight Lines*, 327 U.S. 515, 528-530 (1946). Credit and refund issues in Docket No. ER93-465 *et al.* cannot appropriately be decided on a different and separate record basis from the same issues herein.

power. FKEC transmission is jointly owned by Key West and FKEC. Key West generation provides emergency and reactive power that permits use of FPL transmission. Yet, unless rehearing is ordered, Key West transmission would not be eligible for credits, even where it (or FMPA) pays for network transmission based upon Key West's entire load. Similarly, the Ft. Pierce-Vero Beach transmission, which is connected to FPL transmission at three points, would not be considered "integrated," *but under the Settlement Agreement all of FPL's transmission is.* These issues cannot be considered moot.

Moreover, FMPA stresses that the issue is not whether it should get credits for particular facilities, as such. The issue is whether FPL can use inconsistent, non-comparable and discriminatory definitions in defining the transmission grid and in deciding what facilities are integrated (*i.e.,* perform a useful grid purpose). If FPL wants to charge FMPA for *fully integrating its generation and loads* (*i.e.,* for *full integration service*), then FMPA can reasonably be required to pay FPL for transmission on a full load-ratio share basis. In charging for complete integration, FPL and the Commission must recognize that this complete integration of FMPA's generation and loads can take place only by using FMPA's transmission facilities. In this case and for this reason, FMPA is entitled to credits for its facilities that both it and FPL need to perform the function of integrating FMPA's full loads, which is the very function whose performance has been relied upon to justify charging FMPA on a full-load ratio basis. Here, FPL agrees that its rate base has not been adjusted to exclude facilities that are useful only to it. This leaves an open issue of whether

FMPA can be denied credits for facilities that are comparable to those that FPL includes in its transmission rate base.

These issues are undeniably important to the Commission's missions of advancing competitive markets and pricing transmission fairly. There will be exclusions from and distortions to competitive markets, if smaller system transmission does not count. Certainly, RTOs will be limited under these circumstances. Transmission-dependent systems by definition tend to be less dominant, but they add competitive alternatives to the market place. *Cf. United States v. Microsoft Corp.*, 84 F. Supp. 2d 9 (D.D.C. 1999), *aff'd*, 165 F.3d 952 (D.C. Cir. 1999), *appeal denied sub nom. Microsoft Corp. v. United States*, 530 U.S. 1301 (2000). Adding duplicative costs to smaller systems because smaller-system transmission is not included in the grid undercuts competition.

The Federal Power Act requires transmission rates to be "just and reasonable." 16 U.S.C. §§ 824d, e.[11] This "just and reasonable" language and similar language of companion statutes has been held to require cost-based regulation.[12] By

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[11] The Commission has held that the pricing standards under Sections 211-212 and 205-206 are the same. *Inquiry Concerning the Commission's Pricing Policy for Transmission Services Provided by Public Utilities Under the Federal Power Act; Policy Statement*, [1991-1996 Regs. Preambles] F.E.R.C. Stats. & Regs. ¶ 31,005, at 31,141 (1994).

[12] Departures from cost must be strictly justified. *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486 (D.C. Cir. 1984). "The *fundamental* theory of Commission rate-making is that costs should be recovered in the rates of those customers who utilize the facilities and thus cause the

requiring that smaller, dependent systems pay for transmission to serve *their entire loads* over the transmission-provider system, even where a large part of that load is served using the customer-owned transmission system or the system of others, and, at the same time, by treating their transmission that does serve the load as being beyond the grid and therefore as being not entitled to credits, the FERC would force customers to pay for transmission they do not need. Order No. 888 at 31,736. It simply is not "just and reasonable" to say that a transmission-dependent entity will get no rate recognition for its transmission investments that are comparable to those of transmission-providers *and* at the same time that it will pay transmission-providers for providing transmission service to load that is served from local generation that is beyond the network.[13]

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cost to be incurred." *Northern States Power Co.*, 64 F.E.R.C. ¶ 61,324, at 63,379 (1993) (emphasis in original). Thus, it is a "well-established ratemaking principle that cost recovery should track cost causation." *Indiana & Michigan Mun. Distribs. Ass'n v. Indiana Michigan Power Co.*, 59 F.E.R.C. ¶ 61,260, at 61,956 (1992) (citing *Cities of Riverside v. FERC*, 765 F.2d 1434, 1439 (9th Cir. 1985); *Alabama Elec. Coop. v. FERC*, 684 F.2d 20, 27-29 (D.C. Cir. 1982); *Arizona Pub. Serv. Co.*, 23 F.E.R.C. ¶ 61,419, at 61,931 (1983); *Utah Power & Light Co.*, 14 F.E.R.C. ¶ 61,162, at 61,298 (1981)). *See also K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992) (customers cannot be charged for costs that they do not cause). These principles are applicable to transmission rates. *See Northeast Utils.*, 58 F.E.R.C. ¶ 61,070, at 61,203 (1992) ("transmission customers should be charged the lowest reasonable cost-based rate"); *Western Sys. Power Pool*, 55 F.E.R.C. ¶ 61,099, at 63,316 (1991).

[13] Of course, if FMPA buys network transmission on a contract demand basis, then FPL would have no obligation under that contract demand arrangement to plan for or to provide additional non-compensated

These issues are especially important to Florida. The Florida Supreme Court has recently broadly found that the Florida Public Service Commission has limited authority to certificate merchant plants. *Tampa Elec. Co., Florida Power Corp., and Florida Power & Light Co. v. Garcia, New Smyrna Beach Utils. Comm'n, Duke Energy New Smyrna Beach Power Co.*, 767 So. 2d 428 (Fla. 2000). FPL has been actively opposing the ability of companies to build merchant plants in Florida. *See FPL Group and Entergy Corp.*, Docket No. EC01-33-000, FMPA Motion to Reject Filing, Motion to Intervene, Protest and Request For Relief, Att. A (Affidavit of Albert B. Malmsjo) at ¶¶ 17-24, Att. B (Affidavit of John W. Wilson) at ¶ 38. Thus, the Commission cannot assume that new entry into competitive markets will provide a vehicle to eliminate market power in Florida.

FERC has a duty to prevent transmission discrimination against those who can compete in buying and selling power at wholesale or who must buy power in markedly constrained markets. FPL's refusal to recognize FMPA transmission facilities that are comparable to FPL's must be corrected. For these reasons, this case presents important, unresolved issues for decision.

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transmission.

II. EXPEDITIOUS DECISION IS MANDATED EITHER IN THESE DOCKETS, IN ER93-465 *ET AL.* OR IN BOTH CASES.

A. Resolution of the Issues raised Herein is Mandated

After all the years for which it has been seeking recognition of its transmission facilities on comparable terms to those of FPL, FMPA admits that it was with some discouragement that it received the Commission's draft order asking whether its claim is moot. Considering the history of this case, FMPA submits that expedited decision is justified.

Having been refused network transmission service after lengthy negotiations that began in 1989, FMPA filed an application and complaint for this transmission in TX93-4/EL93-51 in 1993, and requested that the Commission order the service. In 1993, the Commission ordered network service. 67 F.E.R.C. ¶ 61,167.

In 1994, the Commission ruled on pricing. It ordered that pricing for FMPA's network transmission use be based on FMPA's full load ratio share, but said:

> If FMPA has transmission facilities that will operate as part of the integrated transmission system, a credit would be reasonable. Indeed, this is in line with [FPL]'s position that it is redefining the native load that is served by the [FPL] transmission system to

> include all of FMPA's resources and loads. If FMPA owns grid facilities that are now used to integrate the same resources and loads, those facilities are part of the integrated transmission system, and [FPL] must include an appropriate credit for any such grid facilities when it submits its compliance filing in this case.

67 F.E.R.C. ¶ 61,167, at 61,482 n.76.

In 1996 the FERC strictly limited the grid to FPL's own facilities and denied credits. However, the Commission held that FMPA may isolate loads served by local generation and that it need not count those loads as part of network loads that are used to allocate network transmission costs. It said that this need not be a "physical, electrical isolation." The Commission stated that it would apply the same standards in determining the eligibility of FPL's transmission for rate base inclusion in rate cases as it applies to determining the eligibility of municipal transmission for credits. 74 F.E.R.C. ¶ 61,006, at 61,013 and 61,010 n.48.

The Commission has not ruled on rehearing on the credits issues in TX93-4/EL 93-51 and has not ruled on the FMPA Reserved Issues in ER93-465 *et al.* The Commission did accept, however, FPL's position in its "Order Provisionally Granting RTO Status" that permits a "phase-in" of customer facilities. *GridFlorida, LLC*, 94 F.E.R.C. ¶ 61,363 (2001). Alternatively, customers may elect the option to receive full credits for facilities that they demonstrate meet

"the integration standard under Order No. 888." *Id.* at 62,348.[14]

The credits and related issues, reserved in the settlement, are before the Commission in TX93-4/EL93-51, in ER93-465 and in Docket No. ER96-417 ("T-4" network service tariff), OA96-39 (first amendment, intended to conform NSA to OATT), ER96-1375 (providing for service to loads in Jacksonville Beach, Green Cove Springs, and Clewiston), OA96-39 (first amendment, intended to conform NSA to OATT), ER97-4637 (second amendment, adding Vero Beach load), ER98-788 (third amendment, adding Starke load), ER98-1536 (fourth amendment, adding Fort Pierce load), and ER98-2746 (fifth amendment, adding Key West load). These later dockets are already consolidated with Docket No. ER 93-465. From FMPA's vantage point the most sensible thing would be for the Commission to consolidate — at least for purposes of decision — TX93-4/EL98-51, which set the standards with ER93-465 *et al.*

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[14] In that proceeding, FMPA continues to oppose delay in fully crediting FMPA's transmission facilities, on multiple grounds — including both those presented here and additional grounds related to the fact that GridFlorida will actually own FMPA's facilities, or control them on an ownership-equivalent basis. Although FPL's control of FMPA facilities under the parties' pre-GridFlorida network service arrangements is less direct, it is nonetheless substantial. More fundamentally, whether or not FPL controls FMPA facilities, those facilities are comparable to FPL's rate base facilities, and their installation, interconnection, and operation in coordination with FPL's facilities are necessary to enable FPL to provide the full-load-integration service for which it is being compensated. Accordingly, full crediting of FMPA's facilities is appropriate under FPL's individual-provider service, and will become appropriate with added force under the GridFlorida arrangements.

under which service is being taken and under which rates are being collected subject to refund.[15] Regardless, the issues are not moot. Indeed, not only is the issue relevant to FMPA's refund entitlement, but resolution of the issue is also relevant to FMPA's exercise of its GridFlorida option.

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[15] In the past, the Commission has denied a request for partial integration of the ER93-465 record into that of TX93-4/EL93-51. *FMPA v. FPL*, 74 F.E.R.C. ¶ 61,007. However, the fact that both cases are before the Commission for decision, deal with overlapping and parallel issues, and are dependent upon each other strongly supports consolidation for purposes of decision. Effectively, the issues in the two cases have converged. The main parties in interest are the same.

CONCLUSION

For the forgoing reasons, the FMPA Reserved Issues should be decided and refunds should be ordered.

Respectfully submitted,

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May 2, 2001

CERTIFICATE OF SERVICE

I hereby certify that I have on this 2nd day of May, 2001, caused the foregoing document to be sent by first-class mail to all parties on the list compiled by the Secretary of the Commission in this proceeding.

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APPENDIX J

COMMENTS OF FLORIDA CITIES ON SETTLEMENT AND REQUEST FOR RESOLUTION OF RESERVED ISSUES

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Florida Power & Light Company	Docket Nos. ER93-465, ER93-507, ER93-922, EL93-28, EL93-40, EL94-12, EL94-28, EL94-47, OA96-39, ER96-2381, ER96-417, ER96-1375, OA97-245, ER99-723, ER99-2770, EL99-69, EL00-13, and DR98-24
Florida Municipal Power Agency v. Florida Power & Light Co. (not consolidated)	Docket Nos. TX93-4, EL93-51

COMMENTS OF FLORIDA CITIES ON SETTLEMENT AND REQUEST FOR RESOLUTION OF RESERVED ISSUES

INTRODUCTION AND SUMMARY

On April 17, 2000, Florida Power & Light Company filed a Settlement Agreement in these dockets, settling multiple cases and numerous outstanding issues. Although not all of the issue resolutions that are embodied in the Settlement Agreement should be followed in future cases, taken a whole, the agreement represents a reasonable compromise. In this context, Florida Cities fully support the

settlement.[1] They are pleased that settlement could be reached without further litigation and ask Commission approval.

Most of the issues in FPL's rate case and in related cases have been settled. Unfortunately, certain significant issues have not been. These include (1) whether Florida Cities' transmission, which is comparable to FPL transmission that is included in FPL's rate base, should be recognized as part of the FPL transmission grid for transmission rate-making purposes and (2) whether Florida Cities are entitled to credits for their transmission that is comparable to FPL rate base transmission or, alternatively, whether Florida Cities are entitled to exclude load from network load which is served without using FPL transmission. The settlement also does not resolve certain important interchange issues. Settlement Agreement, Part IV.

A correct resolution of the reserved network transmission issues are important to achieve competitive wholesale markets and to prevent market power abuse. Simply put, the issue is whether the transmission of smaller transmission-dependent systems counts.

The reserved issues are probably more important to Peninsula Florida than to anywhere else in the United States. FPL dominates an extremely concentrated generation market. Transmission into Peninsula Florida is limited. It is difficult for independent generators to build merchant plants. Further,

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[1] Florida Cities include the Florida Municipal Power Agency and the municipal electric systems or authorities of Ft. Pierce, Gainesville, Homestead, Key West, Kissimmee, Lakeland, Lake Worth, Starke, St. Cloud, and Vero Beach, Florida.

on behalf of FPL and other dominant generation and transmission companies, the Florida Supreme Court has recently found that the Florida Public Service Commission may not "grant a [required] certificate of need under the Florida Electrical Power Plant Siting Act (Siting Act) and the Florida Energy Efficiency & Conservation Act (FEECA) for an electric power company's proposal to build and operate a merchant power plant in Volusia County." *Tampa Elec. Co.; Florida Power Corp.; and Florida Power & Light Co. v. Garcia, as the Florida Public Service Commission; Utilities Commission, City of New Smyrna Beach; and Duke Energy New Smyrna Beach Power Co., Ltd., LLP.,* Nos. SC95444 *et al.,* 2000 Fla. LEXIS 772 (Fla. Apr. 20, 2000). Slip op. at 1-2, footnotes omitted, citing § 403.501-518, Fla. Stat. (1997) and §§ 366.80-.85, 403.519, Fla. Stat. (1997). The grounds for the Court's decision are that the proposed merchant plant owner, Duke Energy, "is not a Florida retail utility" and most of the plant capacity "has not been committed by contract to be sold to a Florida retail utility." *Id.* at 11. This limitation, supported by FPL, on the building of merchant plants of more than 75 megawatts, makes it especially important to transmission-dependant systems, such as Florida Cities, that generation markets not be further constrained by discriminatory transmission access or by discriminatory pricing.

Florida Cities own transmission that is interconnected with FPL's transmission network. *E.g., Florida Power & Light Co.,* Docket Nos. ER93-465, *et al.*, Exh. FC-54/151-156; FC-182. They believe that this transmission functions as part of FPL's transmission network. Apart from the fact that this transmission is owned by Florida Cities, it cannot be distinguished from FPL transmission. *E.g., Id.* and FC-176/32-33.

The record shows that Florida Cities' transmission benefits FPL. *E.g.,* FC-70/6-8; FC-176/28-29. Such transmission is necessary to serve Florida Municipal Power Agency and member loads and to integrate FMPA and member generation with their loads. *E.g.,* Brief on Exceptions of Florida Cities, *Florida Power & Light Co.,* Docket Nos. ER93-465, *et al.,* at 102-08 (January 29, 1996), and references cited therein; FC-54/151-153; FC-67/13-17; FC-68; FC-70/6-8.

Florida Cities' core position is that Florida Cities' transmission should be recognized as part of the FPL transmission grid *on the same basis* that FPL's transmission is recognized as part of the grid. Florida Cities seek comparability. If FPL transmission *that is of the same nature and serves comparable functions* is included in FPL's rate base, then Florida Cities should receive credits for their similar facilities; if FPL transmission is excluded, comparable Florida Cities' transmission should be excluded.

Similarly, FPL should apply the same standard in determining Florida Cities' eligibility for credits and FPL's entitlement to charge Florida Cities for use of FPL's network. If Florida Cities' transmission is deemed to be beyond the FPL transmission network and therefore ineligible for credits, then load which is served from Florida Cities' "behind-the-meter" generation using Florida Cities or others' transmission cannot be considered to "use" FPL transmission. FPL must apply a consistent definition of the transmission network that includes or excludes smaller system transmission for purposes of determining company rate base, customer eligibility for credits and customer use of company transmission to serve load (*i.e.,* applicable network load). Dependent systems like Florida Cities should not have their own transmission and attached generation and loads

considered to be beyond the grid for purposes of determining customer eligibility for credits, but have their transmission and attached generation and loads considered as within the grid for purposes of determining their amount of use of that grid for ratemaking. If customer transmission, generation and loads are considered to be beyond FPL's grid for purposes of determining eligibility for credits, then the same loads cannot be considered to be network loads on FPL's grid.

When it considered this matter in its decision in *Florida Municipal Power Agency v. Florida Power & Light Co.,* Docket Nos. TX93-4 and EL93-51, 74 F.E.R.C. ¶ 61,006, at 61,007-*11 (1996), reh'g pending ("FMPA v. FPL"),* the Commission accepted FPL's position that Florida Cities' transmission was not part of FPL's transmission grid. It, therefore, ruled that FMPA was not entitled to credits. However, it also ruled that the same standards were to be applied in determining FPL's transmission rate base. 74 F.E.R.C. at 61,010 & n.48. In holding, "the integration of facilities into the plans or operations of a transmitting utility is the proper test for cost recognition" of customer-owned transmission facilities, the Commission was careful to state:

> This fundamental cost allocation concept applies to Florida Power as well as FMPA. Just as FMPA cannot obtain credit for facilities not used by Florida Power [& Light] to provide service, so Florida Power [& Light] cannot charge FMPA for facilities not used to provide transmission service.

The FERC made a parallel ruling in *Order No. 888.*

> We caution all transmission providers that while our discussion here addresses the requirements necessary for a customer's transmission facilities to become eligible for a credit, the principles of comparability compel us to apply the same standard to the transmission provider's facilities for rate determination purposes.

Order No. 888 at 31,743 n.452.

Florida Cities have sought rehearing in *FMPA v. FPL* and have taken exceptions on parallel issues, which are pending before the Commission, in *Florida Power & Light Co.,* ER93-465 *et al.* These are the FMPA Reserved Issues under the Settlement Agreement, Part 4.

FPL has not adjusted its transmission rate base to exclude facilities that are comparable to those of Florida Cities. The Settlement Agreement provides specifically that it does not

> provide any refunds or rate adjustment attributable to [FMPA claims for]...exclusion from FPL's transmission rates the costs of facilities that under the appropriate standard should not be considered part of FPL's integrated transmission system (other than generator step-up transformers (GSUs) and conductors from generators to GSUs, the costs of which will be deemed to have been excluded from FPL's transmission rates for refund and going forward rate purposes).

Settlement Agreement, Part IV.A ("FMPA Reserved Issues"). Thus, in the settlement the parties bargained for the exclusion of GSU-related investment from FPL's rate base, but it is a specific part of the parties' bargain that the rate base is not otherwise adjusted to apply principles that would be consistent with excluding Florida Cities' transmission investment from the grid and thereby with denying Florida Cities credits.

By settling multiple dockets and issues, the settlement greatly simplifies the Commission's tasks. Florida Cities regret that all issues have not been settled. However, under the circumstances, Florida Cities request that the Commission decide these FMPA Reserved Issues based upon these and responsive Comments, the Settlement Agreement and the ER93-465 *et al.* and TX93-4 *et al.* records or that the Commission adopt alternative procedures that it may find appropriate.

Florida Cities note that these issues may be mooted for the future, if Florida adopts a Regional Transmission Organization that conforms to Order No. 2000 requirements. Florida Cities fully support the formation of such an RTO. While the settlement provides for a thirty-seven month rate moratorium (Section II.A.), the moratorium ends with the formation of an RTO. *Id.* at Part II.A.4. Therefore the grid definition and related issues are likely to impact current and past locked-in rates, but in the future such issues are likely to be resolved as a result of RTO negotiations. (Regardless whether they are part of an FPL grid, it cannot be doubted that Florida Cities' transmission would be part of a *Florida* grid, which could not be excluded from such a grid.)

The Settlement Agreement does not resolve the FMPA Reserved Issues relating to the definition of the

transmission network and the inclusion or exclusion of Florida Cities' transmission facilities. It is necessary to comparability and non-discriminatory market access as well as to equity among the parties that these issues be decided.

I. THE PARTIES AND THEIR INTERESTS

This settlement is between Florida Power & Light Company, Florida Cities and other parties in these above-captioned proceedings. Florida Power & Light Company, a jurisdictional utility, is Florida's largest electric utility. It owns and operates an extensive transmission network throughout eastern and southern Florida.

Florida Cities include the Florida Municipal Power Agency and certain FMPA-member municipal electric systems and authorities. FMPA and other Florida Cities own and operate transmission facilities. However, they are dependent upon FPL transmission.

FMPA is a joint action agency, created in 1978 under Florida law, which provides power supply and other project services for twenty-eight member municipal systems throughout the state of Florida. FMPA requires the use of the FPL transmission system to integrate its resources to serve requesting member city All-Requirements Project load on the FPL system, to transmit to and from its member cities and for other needs. FMPA competes with FPL for wholesale sales and purchases.

As is self-evident from the settlement and the context of these cases, Florida Cities are directly affected by the Settlement Agreement to which they are a party. No other person can adequately protect Florida Cities' interests. They are each parties in one or more of the affected dockets.

The names, addresses and telephone numbers of the persons to whom communications concerning this matter should be addressed are as follows:

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Because this pleading is relevant to issues in *FMPA v. FPL, supra*, it is being served on parties to that docket in addition to parties in these settlement dockets.

II. THE SETTLEMENT RESERVES FOR DECISION ISSUES THAT HAVE BEEN RAISED BY FLORIDA CITIES CONCERNING THE DEFINITION OF THE GRID, ENTITLEMENTS TO CREDITS FOR CUSTOMER TRANSMISSION AND BEHIND-THE-METER GENERATION

The settlement broadly resolves issues in the FPL rate case in Docket No. ER93-465 *et al.* and related dockets. Specifically, Part IV.A of the settlement, which is partially quoted above, states:

> This Settlement Agreement does not resolve (or provide any refunds or rate adjustment attributable to resolving) the question of whether FMPA is entitled to refunds in connection with the network transmission service it purchases from FPL as a result of claims that FMPA has made for (i) credits for customer-owned transmission facilities, (ii) treatment of behind-the-meter generation and associated load, and (iii) exclusion from FPL's transmission rates of the costs of facilities that under the appropriate standard should not be considered part of FPL's integrated transmission system (other than generator step-up transformers (GSUs) and conductors from generators to GSUs, the costs of which will be deemed to have been excluded from FPL's transmission rates for refund and going-forward rate purposes).

> Collectively, these issues are referred to as the "FMPA Reserved Issues."

Docket No. TX93-4, which is FMPA's complaint against FPL requesting network service and which includes the Reserved Issues, is "wholly unaffected by th[e] Settlement Agreement." The Settlement Agreement terminates Docket No. ER93-465 *except for* the FMPA Reserved Issues and certain Interchange issues. Settlement Agreement, Part IV.B.

The FMPA Reserved Issues are at the core of comparability. In making these comments, FMPA relies upon its pleadings and the records in TX93-4 *et al.* and in ER93-465 *et al.* (The TX93-4 *et al.* Dockets establish FMPA's entitlements to network transmission service. Because the ER93-465 rate case was tried after the TX93-4 complaint and is a litigated rate case, that Docket contains the more complete record.)

These records fully support that Florida Cities' transmission is just like that of FPL in terms of function and purpose.

> ... FMPA and member-owned transmission facilities in fact have the engineering characteristics such as they are grid facilities consistent with network transmission functions and FPL definitions ....[They] must be available to all traders to facilitate efficient electricity loads and generating units ...By any definition, the network would include transmission owned by FMPA or its member cities, which provides a vehicle for FPL (and others) to sell to a market that includes Florida Cities

> and for Florida Cities to participate in that market. Such Florida Cities' transmission is electrically part of the grid, and if owned by FPL, would have undoubtedly been included in FPL's rate base.

Docket No. ER93-465, Exh. FC-54/151, 152, 154. *Accord,* FC-67/13-17; FC-68; fc-70/6-8; FC-176/4-16, 21-25, 28-34; FC-68-69.

An examination of the "Transmission System Breaker Diagrams" in Docket Nos. ER93-465 *et al.*, Florida Cities Exhibit 179, shows that the FPL transmission that is included in rate base is indistinguishable from Florida Cities' transmission that FPL claims is ineligible for credits. Brief on Exceptions of Florida Cities at 107-108 (January 29, 1996) and references therein; Exh. FC-176/32-33; FC-179. Indeed, when FPL offered to buy the Lake Worth municipal system, the offer included payment to Lake Worth for city-owned transmission facilities that FPL considered to be ineligible for credits, but that it would include in its rate base, had FPL's acquisition offer been accepted. Exh. FC-176/30; FC-70/7; FC-71. It is plainly anticompetitive for a transmission monopolist to grant a smaller, dependent, competing system benefits if and only if it sells its system, but not otherwise. Sherman Antitrust Act § 2, 15 U.S.C. § 2; *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9 (D. D.C. 1999); *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D. D.C. 2000). Transmission usefulness is a matter of function, not legal title.

The FMPA Reserved Issues involve defining the applicable transmission grid. Florida Cities maintain that they are entitled to transmission rate credits for their

transmission investments, which are *functionally* comparable to facilities that FPL includes in its rate base. FPL charges all customers, including Florida Cities, for the use of the transmission network to integrate the generation and load of *both* FPL and transmission-dependant network users. Florida Cities have pointed out that their facilities are necessary to integrate their generation and to serve Florida Cities' loads. If they did not own the transmission, FPL would have been required to build it in order to provide the service. Docket No. ER93-465, FC-54, 152, 154. In this situation, Florida Cities believe that their transmission is as much a part of the transmission network as FPL's transmission and that they should get credit for their investments.

However, Florida Cities stress the issue is not whether they should get credits for particular facilities, as such. The issue is whether FPL can use inconsistent, non-comparable and discriminatory definitions in defining the transmission grid. If FPL wants to charge Florida Cities for *fully integrating their generation and loads* (*i.e.,* for *full integration service*), then Florida Cities can reasonably be required to pay FPL for transmission on a full load-ratio share basis. In charging for complete integration, FPL and the Commission must recognize that this complete integration can take place only by using Florida Cities' transmission facilities. In this case and for this reason, Florida Cities are entitled to credits for their facilities *that are necessary to perform the integration service for both Florida Cities and for FPL.*

If credits are not ordered, then sales markets are distorted with the advantage being tilted towards the most dominant companies. Dependent systems must pay for their proportionate share of *all* transmission-provider investment (so the transmission-provider pays less), including that

investment which is used to serve transmission-provider retail load. In addition, they must pay for 100% of their own transmission investment. It would be difficult to imagine more discriminatory and market-distorting rules.

Alternatively, Florida Cities have recognized and continue to recognize that one can define transmission grids more narrowly so that a transmission network is limited to transmission-provider facilities (except for joint-ownership arrangements and the like). Florida Cities believe that such artificial limitations are counter-productive in that they balkanize transmission, create pancaking, bifurcate markets and reduce electrical coordination. However, if the Commission accepts FPL's narrow delineation of the transmission network, then by definition it is placing some of Florida Cities' generation and loads outside of the FPL transmission network boundaries, as FPL draws them. In this situation, the Commission cannot rationally permit FPL to include loads that are beyond the transmission grid as part of Florida Cities' network load, when those loads are served from local generation without using FPL's transmission network. Where customer generation and load are beyond the grid, the transmission-provider's grid is not being used. In this situation, there may be a transmission load, but it is not a load on FPL's network.

Florida Cities' main legal objection is not FPL's refusals to provide credits or FPL's including in network load customer-load that is served without using FPL transmission, taken in isolation. It is FPL's use of inconsistent grid definitions, when dealing with the load-ratio and credits issues. In determining Florida Cities' eligibility for credits, FPL says there should be no credits, because Florida Cities' transmission is not part of *FPL's* grid. In setting Florida Cities' load-ratio share, FPL charges for load that is served

from behind-the-meter generation over customer transmission, claiming that there is a use of the FPL grid. FPL cannot have it both ways.

These issues are of undeniable importance to the Commission's advancing competitive markets and to its getting transmission pricing right. There will be exclusions from and distortions to competitive markets, if smaller system transmission does not count. Certainly, RTO's will be limited under these circumstances. Transmission-dependent systems by definition tend to be less dominant, but they add competitive alternatives to the market place. *Compare United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D. D.C. 2000). Adding duplicative costs to smaller systems because smaller-system transmission is not included in the grid undercuts competition.

The Federal Power Act requires transmission rates to be "just and reasonable." 16 U.S.C. §§ 824d, 824e. This "just and reasonable" language and similar language of companion statutes has been held to require cost-based regulation. Departures from cost must be strictly justified. *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486 (D.C. Cir. 1984) "The *fundamental* theory of Commission rate-making is that costs should be recovered in the rates of those customers who utilize the facilities and thus cause the cost to be incurred." *Northern States Power Co.*, 64 F.E.R.C. ¶ 61,324, at 63,379 (emphasis in original). Thus, it is a "well-established ratemaking principle that cost recovery should track cost causation." *Indiana & Michigan Mun. Distribs. Ass'n v. Indiana Michigan Power Co.*, 59 F.E.R.C. ¶ 61,260, at 61,996 (1992) (citing *Cities of Riverside v. FERC*, 765 F.2d 1434, 1439 (9th Cir. 1985)); *Alabama Elec. Coop. v. FERC*, 684 F.2d 20, 27-29 (D.C. Cir. 1982); *Arizona Pub. Serv. Co.*, 23 F.E.R.C. ¶ 61,419, at 61,931 (1982); *Utah*

Power & Light Co., 14 F.E.R.C. ¶ 61,162, at 61,298 (1987). *See also KN Energy, Inc. v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992) (customers cannot be charged for costs that they do not cause). These principles are applicable to transmission rates. *See Northeast Utils.* 58 F.E.R.C. ¶ 61,070, at 61,203 (1992) ("transmission customers should be charged the lowest reasonable cost-based rate"); *Western Sys. Power Pool*, 55 F.E.R.C. ¶ 61,099, at 63,316 (1991). By requiring that smaller, dependent systems pay for transmission to serve *their entire loads* over the transmission-provider system, even where a large part of that load is served using the customer-owned transmission system or the system of others, and, at the same time, by treating their transmission that does serve the load as being beyond the grid and therefore as being not entitled to credits, FERC forces customers to pay for transmission they do not need. Order-888 at 31,736. It simply is not "just and reasonable" to say that a transmission-dependent entity will get no rate recognition for its transmission investments that are comparable to those of transmission-providers *and* at the same time that it will pay transmission-providers for providing transmission service to load that is served from local generation that is beyond the network.[2]

If a 100MW system needs 40MW of network transmission service, it may properly be charged for the full 100MW, not its actual use (40MW), if its facilities that serve the full load are part of the grid and it receives credit for their contribution. However, if its facilities are considered to be beyond the grid, as the following diagram shows,

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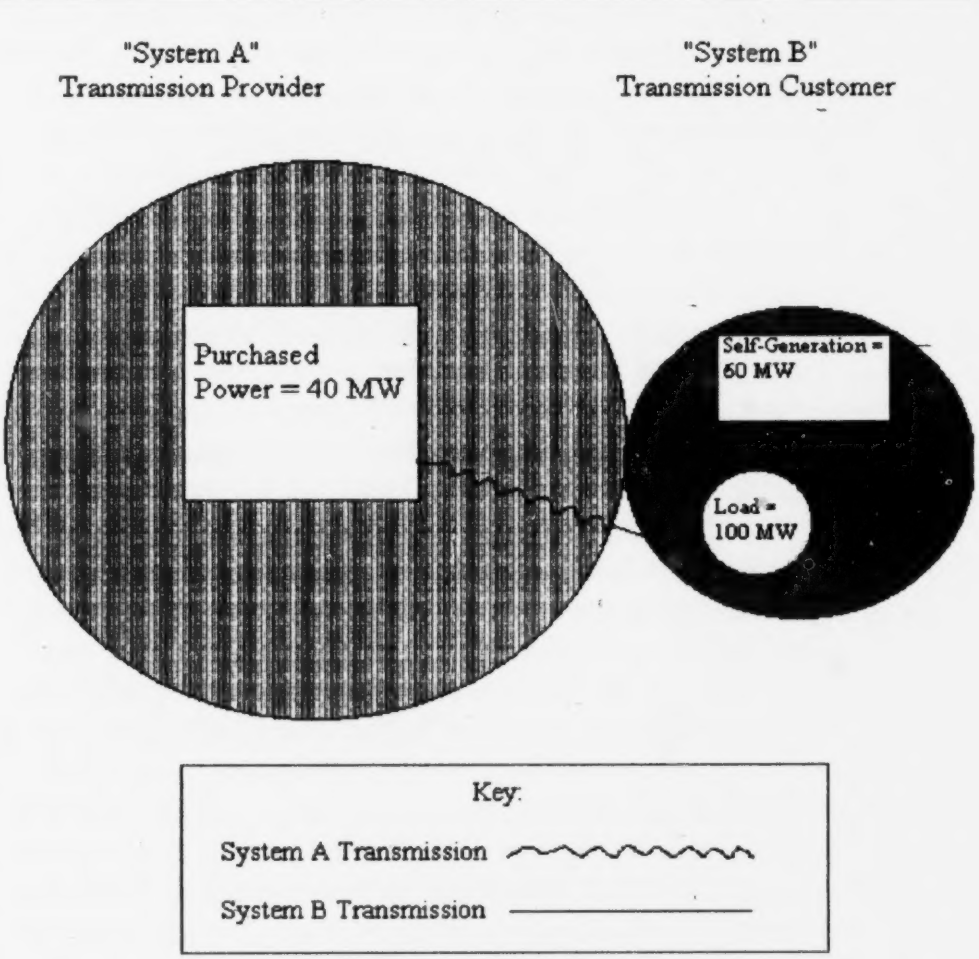
[2] Of course, if Florida Cities buy network transmission on a contract demand basis, then FPL would have no obligation under that contract demand arrangement to plan for or to provide additional non-compensated transmission.

transmission-providers incur no cost to transmit 60MW of power. This amount is transmitted over the transmission-customer system.

Transmission Charge by "System A" to "System B" = 100 MW



FPL has never shown why transmission customers should pay for non-existent costs for service that they do not receive. Such treatment in unjust and unreasonable and violates the anti-discrimination and preference provisions of the Federal Power Act without need or justification. By contrast, Florida Cities' position is simple: the definition of the grid must be applied consistently.

For reasons that have been stated in the Introduction and Summary, these issues are especially important to Florida. Florida does not yet have an RTO. Florida Cities are participating aggressively in efforts to bring one about, largely through FMPA. However, there is no guarantee that negotiations will be successful. FPL has said recently that it favors a transco, but the record on the FMPA Reserved Issues in Docket Nos. ER93-465 *et al.* and TX93-4 *et al* shows FPL's decades-long resistance to giving up transmission control and its affirmative use of transmission control to control markets. Exh. JWW-1 at 84, 88.

Florida is a peninsula. The ties to the North are constrained. As a result of these factors and other Florida transmission barriers and of FPL generation concentration, FPL has substantial market power. *Id.* at 84-85. FPL has taken a lead role in opposing independent generation, often successfully. *Id.* at 119. Thus, there is very little non-utility-owned generation in Florida and there are no merchant plants. As is highlighted above, the Florida Supreme Court has recently broadly found that the Florida Public Service Commission has limited authority to certificate merchant plants. *Tampa Elec. Co.; Florida Power Corp.; and Florida Power & Light Co. v. Garcia*, 2000 Fla. LEXIS 772 (Fla. April 20, 2000). FPL has been actively opposing the ability of companies to build merchant plants in Florida. *See* Attachment A. Thus, the Commission cannot assume that

new entry into competitive markets will provide a vehicle to eliminate market power in Florida.

FERC has a duty to prevent transmission discrimination against those who can compete in buying and selling power at wholesale or who must buy power in markedly constrained markets. The refusal of FPL to recognize Florida Cities' comparable transmission to FPL's must be corrected.

III. UNDER THE SETTLEMENT AGREEMENT, THE CREDITS-BEHIND-THE-METER ISSUES MUST BE DECIDED FAVORABLY TO FLORIDA CITIES

The Settlement Agreement does not adjust FPL's rate base to exclude all facilities other than back-bone 230/500 kV or similar transmission in a way that would treat FPL's transmission comparably to that of Florida Cities. The Commission's treatment of issues concerning the definition of the grid, credits and behind-the-meter generation makes clear that although companies may have leeway in determining the definition of transmission that they will consider "used and useful" to the grid, they cannot treat their own transmission more favorably than that of others. Because in matters relevant here it is express and bargained-for under the Settlement Agreement that FPL's rate base has not been adjusted, the Commission must either, preferably, order credits for similar Florida Cities' facilities that are included as part of the grid, or, alternatively, order contract demand network rate availability.

In *FMPA v. FPL*, Docket Nos. EL93-81 and TX93-4, *reh'g pending*, the Commission rejected FMPA's claims to credits for its own and its members' facilities, accepting

FPL's arguments that these facilities are not part of FPL's transmission grid. However, as is required under comparability principles, the Commission made clear that to the extent that FPL refused to recognize FMPA facilities as part of its grid, FPL would have to apply the same transmission definitions in determining which of its own facilities should be included in rate base. *See* Quotation in Introduction and Summary, *supra*.[3]

Additionally, the Commission recognized that FMPA may be able to exclude from load-ratio share "isolated" loads that are served using local generation without using FPL transmission. *FMPA v. FPL,* 74 F.E.R.C. at 61,012-13. It made clear that by "isolated" it did not mean electrically isolated. However, if it supplemented use of its own transmission to serve load that was excluded from the load-ratio share, FMPA would have to buy additional, necessary transmission.

Since the *FMPA v. FPL* decisions issued, a number of major companies have made available a contract demand network rate that permits integration of their own or neighboring entity network loads up to a specified amount and requires the purchase of separate point-to-point transmission where required for additional amounts. Others had sold contract demand network service in the past.[4] Such

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[3] It has never been at issue that Florida Cities' facilities are transmission and, as such, should be part of a larger Florida grid. The only question is the definition of the *FPL* transmission network, and whether that network should exclude facilities owed by neighboring network customers.

[4] Pursuant to the settlement agreement reached between AEP/CSW and AMP-Ohio in Docket Nos. EC98-40 *et al.*, the merging companies agreed to amend their OATT to include a new service, Contract Demand Network service. *See* December 30, 1999 letter from Kevin F. Duffy to Secretary Boergers filed in Docket No. ER98-2786. *See also Florida*

contract demand network rate avoids the problem associated with pricing network transmission on a full load ratio-basis where a system has its own local generation or receives power supply from a third system and, therefore, does not need or want network transmission for all its loads. More simply put, it avoids the problem of charging systems for transmission, which duplicates other arrangements, that they do not want or need and cannot use.

In Orders No. 888 and 888-A, the Commission addressed the issue of credits and behind-the-meter loads more generically, but it followed the principles of *FMPA v. FPL*. It suggested that it would permit transmission-providers to limit the definition of their transmission grids essentially to their own facilities to the exclusion of those of neighboring entities except where such neighboring entities meet strict requirements. But again, the Commission warned dominant transmission-owners *that they must apply the same*

Power Corporation Amendment to Open Access Transmission Tariff providing for Network Contract Demand Transmission Service, filed on May 20, 1997 under docket number ER97-3057-000; *Joint Application of CP&L Holdings* filed February 3, 2000 under docket number EC00-55-000 at p. 25 (acknowledging that FPC OATT currently in effect includes provision for network contract demand transmission service). In the past, Consumers Energy Company (formerly Consumers Power Company) offered both firm scheduled point-to-point transmission service and unscheduled firm network transmission service under its filed tariff. *See Consumers Energy Company*, 85 FERC ¶ 61,100 at 61,357-58 (1998) (referencing tariff filed in 1992). The sale of partial requirements power often combined a network use of transmission with point-to-point arrangements. *See also* Order No. 888-A, at 30,261-62, where the Commission recognized that a network customer who was already purchasing point-to-point service (referring to the Central Minnesota Municipal Power Agency (Mountain Lake)-WAPA arrangement) could justify a credit.

tests to their own facilities for rate base inclusion or exclusion. Order No. 888 at 31,743 n.452, quoted in Introduction and Summary, *supra.*

The Commission may want to revisit some of these cases to ensure consistency with comparability and non-discrimination standards. Florida Cities believe that it should.[5] However, these cases, as they were decided, mandate that the Commission order refunds to Florida Cities and set rates to prevent FPL from applying a discriminatory definition under which FPL defines the grid broadly for rate base purposes, but narrowly for customer credit purposes. Because the settlement adjusts the rate base to eliminate GSUs, but not to make the rate base consistent with a disallowance of credits, credits must be ordered in order to make consistent standards for determining rate base and standards for determining customer credits.

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[5] In Order No. 888-A at 30,259-60, the Commission expressed concerns that if transmission customers could buy both network and point-to-point service to serve loads at a single delivery point, there might be "operational problems" and potentials for "gaming" the system. The fact that major Transmission owners sell or have sold contract demand network transmission negates this concern. *See* footnote 5, *supra.* This fact also demonstrates that transmission-providers can establish reasonable terms for such service. See discussion in Part IV, *infra.* The premise that customers must pay transmission-providers to integrate all their loads at a single delivery point is contrary to recent electric market developments that encourage specialized transactions to meet specific needs. Order No. 888 was itself designed to correct the forced bundling of transmission services, of power sales transactions or both in order to permit the development of more fluid markets. Among the concerns in the *Microsoft* cases are potentials for limiting development of unbundled products, for example, of computers (at less cost) for those who only need word processing. *United States v. Microsoft Corp.,* 84 F. Supp. 2d 9, 48, 54-7, 61, 110 (D. D.C. 1999). The stricture against partial integration results in forced bundling, which can only retard competitive markets.

In Docket No. ER93-465, FPL's case position was that the FPL Transmission System functions as an entire integrated whole to serve its customers and that it cannot and should not be segregated. *E.g.*, Exh. FPL-176/9-16. The Settlement Agreement is consistent with FPL's case position that FPL cannot practically separate its transmission investment. In Docket No. ER93-465, Florida Cities asked and were refused discovery concerning certain FPL investments in parts of FPL's transmission system that they believed might not serve a transmission function. FPL claimed that providing the information would be unduly burdensome and expensive (and on the merits that it was appropriate to include all of its facilities in rate base. *See generally* Exh. FPL-176.). Therefore, the parties stipulated that such data would be provided only at "a compliance stage, to be performed if the Commission determines the costs of these facilities should be excluded from FPL's transmission rates." Letter from David E. Pomper, Attorney for Florida Cities to Attorneys for Florida Power & Light Company, memorializing "agreements with respect to FPL's objections to Florida Cities' ninth data requests to FPL," *Florida Power & Light Co.*, Docket Nos. ER93-465 *et al.*, at 1 and § 9-26 (August 8, 1994), attached to "Brief on Exceptions of Florida Cities," (January 29, 1996). Thus, the settlement rates reflect no adjustment to make them comparable to denying Florida Cities credits. Hence, under the terms of the Settlement Agreement, especially in light of the Stipulation, credits or other relief must be ordered. FPL has not adjusted its rate base to achieve comparability with the standards that FPL applies to deny Florida Cities credits. In this case, credits are required.

IV. MISCELLANEOUS FPL ARGUMENTS CANNOT JUSTIFY THE FERC'S

ABANDONMENT OF COMPARABILITY PRINCIPLES

Over the years FPL has made numerous arguments opposing Florida Cities' entitlement to credits or adjustments to network load to recognize that part of FMPA's load is served locally without using FPL's transmission network (*i.e.,* to a contract demand network rate). We rely on our briefs and the case records with respect to these arguments. However, Florida Cities again stress that when it is recognized that the real issue is the proper definition of the transmission network and that, however the network is defined, the same definition must be used for determining the credits/behind-the-meter issues and the rate base issues, resolution is clear. Where the Settlement Agreement adopts an unadjusted FPL rate base, similar Florida Cities facilities must be credited.

FPL has argued that Florida Cities may have load that is served from local generation without using FPL transmission, but that FPL also has such load. If the argument had merit, then, of course, FPL would be entitled to reduce its own network load. However, FPL has not adjusted its settlement rate base to resolve the FMPA Reserved Issues. Apart from its GSU-related investments, FPL must be presumed to have included all its transmission in rate base. Settlement Agreement, Part IV.A. Moreover, the argument that FPL does not serve portions of its load without using FPL transmissions is rejected by FPL's own transmission expert witness, who testified as to the "integrated and indivisible characteristics of ... the FPL transmission system." *Florida Power & Light Co.,* Docket No. ER93-465 *et al.,* Prepared Answering Testimony of Karabet Adjemian, FPL Exh. 1 at 3. FPL's Manager of Integrated Resource Planning of the System Planning Department testified that its

transmission facilities are designed and operated to coordinate FPL's total generation and load.

> Fundamentally, FPL's system is an integrated system planned as a single entity to serve specific and identifiable functions ....Having an integrated transmission system means that all transmission facilities work in a coordinated manner to back up the whole system.... As an integrated utility, FPL operates all its resources to serve its total load in FPL's service territory and its other contractual commitments. Resources are economically committed and dispatched.... Further, because the resources are integrated through FPL's transmission system, each resource is available to serve as a backup to other resources....

Exh. FPL-1 at 5, 8, 9. Likewise, its Panel testified that load is served from FPL generation and transmission as a whole. FPL-176/14-15. In light of FPL's testimony, it is untenable for FPL to argue that it has isolated loads that are served without using its transmission system comparable to municipal loads that are served using non-FPL generation, which FPL treats as *outside of* FPL transmission boundaries.

All transmission customers pay through transmission rates for all FPL rate base transmission, even where such transmission has no value to non-FPL transmission-only customers, because it integrates only FPL generation and loads. In this situation if transmission customers do not get credits for their own transmission investments, they are forced to subsidize sales by FPL through transmission rate

payments based on FPL's total rate base, including facilities to integrate its generation with its sales markets.

In light of its testimony and case positions that have been adopted by the Presiding Law Judge in Docket No. ER93-465 *et al.*, and under the Settlement Agreement, FPL can make no credible argument that it serves some load without using its transmission system or that all of its generation and loads are not integrated. If Florida Cities' transmission is part of the grid, and Florida Cities receive credits, they will be treated in the same way as FPL. If they are denied credits, *FPL*, not Florida Cities, would be saying that Florida Cities' generation and loads are beyond FPL's transmission system. In this case, it is not appropriate to charge for use of FPL's transmission to reach loads that are served with Florida Cities' or others' transmission.

Florida Cities have transmission investments. Ultimately, FPL's myriad of arguments boil down to asserting that if Florida Cities receive credits for their transmission investments, or any part of them, FPL will not receive as large a contribution to its fixed costs as it has received in the past, when transmission dependent systems bore a fully allocated share of FPL's transmission costs along with the entirety of their transmission costs.[6] The result is to

---

[6] In Order Nos. 888 and 888-A, largely based on FPL positions, the Commission expressed a belief that it is impossible (or at least very difficult) to serve load at a single delivery point in part under a network rate and in part under other arrangements. Order No. 888-A at 30,259-60. However, as is discussed in Argument III, *supra*, the fact that other major systems, including Florida Power Corporation, are doing so belies any claim of impossibility or impracticability. *See* footnote 6, *supra*. FPL also raised concerns about customers who bought network and point-to-point transmission "gaming" the system. Of course, here, where arrangements are locked in and to a great extent refunds are involved, there can be no gaming. FPL also raised concerns about customers of

have Florida Cities subsidize FPL's generation sales and to have them pay disproportionate transmission costs. FPL's reference point is the past when the dominant transmission owners like FPL could insist that only their transmission ownership should be recognized.

All Florida Cities ask is that their investments be treated on the same basis as FPL's. Comparability demands no less.[7]

CONCLUSION

The Commission should approve the Settlement filed by FPL.

The Commission should resolve the reserved issues, based on the records in FPL's rate case, ER93-465 *et al.* and FMPA's complaint case, TX93-4 *et al.* or under other procedures, as may be appropriate.

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both network and point-to-point transmission "gaming" the system during the Order 888 proceedings. *Id.*

[7] As part of its January 21, 1999, Status Report in Docket Nos. TX93-4 and EL93-51, FMPA submitted a unilateral Offer of Settlement pursuant to Rule 602. This Settlement Offer was designed to settle these issues, and, therefore, was far less favorable to Florida Cities than the record justifies and, Florida Cites believe, than equity requires. Florida Cities proffered an offer that provided for credits for only limited Florida Cities' transmission investments whose benefit to the grid is uncontrovertible. FPL rejected Florida Cities' proposal and the Offer was never noticed by the Commission. Florida Cities reiterate their belief that the issues in this case should have been, and are capable of, settlement, but to date settlement has proven impossible.

Respectfully submitted,

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May 9, 2000

CERTIFICATE OF SERVICE

I hereby certify that I have on this 31st day of May, 2000, caused the foregoing document to be sent by first-class mail to all parties on the list compiled by the Secretary of the Commission in this proceeding.

_____

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K-1

ORAL ARGUMENT IS SCHEDULED FOR
NOVEMBER 19, 2002

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1381

FLORIDA MUNICIPAL POWER AGENCY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition For Review Of Orders Of The
Federal Energy Regulatory Commission

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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September 20, 2002

B. The Commission Considered All The Evidence.

FMPA contends that the Commission did not consider FMPA's evidence proffered to demonstrate that its facilities are integrated with FPL's (Pet. Br. at 16-17, 20-21). FMPA quotes two sentences from *FMPA III* FMPA claims as support that "FERC was unaware of and, therefore, could not have considered basic evidence and argument in integration." Pet. Br. at 21, citing 96 FERC at 61,545. That limited view overlooks, however, the full analysis of that evidence in *FMPA II*, which is part of the record in this case. *See FMPA II*, 74 FERC at 61,007-08, 61,009-11 (summarizing and analyzing the evidence and argument submitted by each party). The Commission is not required to repeat its earlier analysis for reiterated arguments in subsequent orders. *See Universal Camera v. NLRB*, 340 U.S. 474 (1951) (findings of fact must be supported by substantial evidence "on the record as a whole").

C. FMPA's Facilities Are Interconnected, Not Integrated, With FPL Transmission Facilities.

Integration of its facilities with those of the utility is required before a customer may obtain credits for use of its transmission facilities by the utility. *TAPS*, 225 F.3d at 726. For facilities to be integrated (as opposed to merely being interconnected) required both sets of transmission facilities to be operated as part of the same network, integrating all resources and loads on that network. *FMPA II*, 74 FERC at

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Case Scheduled For Oral Argument
Tuesday, November 19, 2002

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

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v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition For Review Of Orders
Of The Federal Energy Regulatory Commission

FINAL BRIEF OF INTERVENOR FLORIDA POWER & LIGHT COMPANY

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September 20, 2002

Commission's second order denying rehearing, *FMPA III*. Petitioner's Brief at 20-21. FMPA writes its Brief as though the only evidence before the Commission was that filed by FMPA. To the contrary, FPL filed extensive evidence showing that FMPA's facilities are not integrated with the FPL transmission system. In *FMPA II*, before reaching its conclusions that no credit is appropriate, the Commission discussed at length the evidence submitted by *both* FMPA and FPL. *See FMPA II*, 74 FERC at 61,007-11. In its second order denying rehearing, the Commission is not required to repeat its earilier findings.[1]

Below, FPL discusses the specific facilities for which FMPA sought credits. A review of the entire record and the Commission's orders, supports finding that the Commission reached a reasoned decision based on the evidence presented by FMPA and FPL.[2]

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[1] Since the court must examine the whole record to determine the agency's reasoning, the court may look to the initial or prior orders, which are part of the record, to discern the facts and reasoning upon which the Commission's decision was based. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951) (findings of fact must be supported by substantial evidence "on the record considered as a whole"). If the Commission provides adequate explanation in support of its decision in prior orders, which are part of the record, the court may look to this reasoning, in its examination of the "whole record," even if the reasoning is not repeated in subsequent orders. *See Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 971-72 (D.C. Cir. 2000) (court examined the prior orders in the proceeding to determine whether FERC's decision was supported by substantial evidence); *Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 542 (D.C. Cir. 1999) (same).

[2] A FERC order passes the arbitrary and capricious test when the totality of the record before the reviewing court shows that the Commission engaged in "reasoned decisionmaking." Indiana Municipal Power Agency v. FERC, 56 F.3d 247, 254 (D.C. Cir. 1995). The scope of review under the arbitrary and capricious standard is narrow and deferential and "a court is not to substitute its judgment for that of the agency." Motor Vehicle Mfrs. Assn'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983). The court must defer to the Commission's findings of fact so long as they are supported by substantial evidence in *(continued on next page)*

Supreme Court, U.S.
FILED
SEP 2 2003
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No. 03-20

In the Supreme Court of the United States

FLORIDA MUNICIPAL POWER AGENCY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that the Federal Energy Regulatory Commission adequately considered arguments petitioner made in an administrative proceeding.

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In the Supreme Court of the United States

No. 03-20

FLORIDA MUNICIPAL POWER AGENCY, PETITIONER

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FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 315 F.3d 362. The orders of the Federal Energy Regulatory Commission are reported at 96 F.E.R.C. ¶ 61,130 (Pet. App. B1-B8), 74 F.E.R.C. ¶ 61,006 (Pet. App. B9-B72), and 67 F.E.R.C. ¶ 61,167 (Pet. App. B73-B114).

JURISDICTION

The judgment of the court of appeals was entered on January 21, 2003. A petition for rehearing was denied on March 28, 2003 (Pet. App. C1-C2). The petition for a writ of certiorari was filed on June 26, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 201(b) of the Federal Power Act (FPA), 16 U.S.C. 824(b), confers on the Federal Energy Regulatory Commission (FERC or Commission) jurisdiction to determine the rates, terms, and conditions of public utilities' electric transmission service in interstate commerce. Section 211(a) of the FPA, 16 U.S.C. 824j(a), provides that an electric utility or other person "generating electric energy for sale for resale, may apply to the Commission for an order under this subsection requiring a transmitting utility to provide transmission services * * * to the applicant." 16 U.S.C. 824j(a). Orders under Section 211(a) "shall require the transmitting utility subject to the order to provide wholesale transmission services at rates, charges, terms, and conditions which permit the recovery by such utility of all the costs incurred in connection with the transmission services." 16 U.S.C. 824k(a). "[T]o the extent practicable," costs that a utility incurs in providing transmission service under a Section 211 order are to be recovered from the applicant for the order. 16 U.S.C. 824k(a).

2. Petitioner is a public agency in Florida that provides electric power to its member municipal utilities. Pet. App. A5. In 1993, petitioner applied to FERC under Section 211(a) for an order requiring Florida Power & Light Company (Florida Power) to provide petitioner electric transmission service. FERC ordered Florida Power to provide the requested service and directed the parties to agree on rates, conditions, and terms of service. *Id.* at A5, B115-B176. After the parties failed to agree, FERC entered an order that generally adopted Florida Power's pricing proposal, see *id.* at B99, but also stated that petitioner would be

entitled to a credit against Florida Power's transmission charges if it could show that its own transmission facilities "operate as part of [an] integrated transmission system" with Florida Power's facilities, *id.* at B101 n.76. See *id.* at A5-A6.

Petitioner then asked FERC to enter an order establishing that, due to network integration, petitioner is entitled to credits that entirely offset Florida Power's transmission charges. In January 1996, FERC denied petitioner's request. See Pet. App. B18-B29. Based on the evidence submitted by the parties, FERC concluded that, although petitioner's member municipal utilities interconnect their transmission facilities with Florida Power's transmission system, the members' facilities do not "operate[] as part of the Florida Power integrated transmission network." *Id.* at B27; see *id.* at B25-B29.

Petitioner requested rehearing of FERC's denial of credits. See Pet. App. B1-B8. In July 2001, after various intervening developments, see *id.* at B2, FERC denied rehearing. FERC identified "[t]he key issue in the case [a]s whether [petitioner's] facilities are integrated with Florida Power's transmission system, such that [petitioner] would be entitled to receive credit * * * for transmission facilities owned by [petitioner] or its members." *Id.* at B1-B2. To answer that question, FERC first recalled its earlier conclusion, in January 1996, that the record evidence established network interconnection rather than network integration. *Id.* at B5. FERC next explained that, in an intervening rulemaking concerning nondiscriminatory access to electric utilities' transmission services, it had "elaborated on the criteria necessary to meet the system integration test" (*ibid.*) and confirmed that interconnection of transmission facilities does not alone establish

integration. See *id.* at B5-B6; see generally *New York* v. *FERC*, 535 U.S. 1, 11-14 (2002) (discussing FERC Order Nos. 888 and 888-A). FERC then stated:

> [Petitioner] has not demonstrated, nor does [petitioner] even argue, that its facilities meet the test. Neither does [petitioner] dispute the findings in [FERC's January 1996 order] that the interconnections are primarily single points used only to transfer power between the Florida Power transmission system and that of each [of petitioner's member utilities]. Accordingly, the Commission affirms its ruling in [the January 1996 order].

Pet. App. B6.

3. The court of appeals denied petitioner's ensuing petition for review. Pet. App. A2-A14. In relevant part, the court deemed FERC's statement that petitioner "has not demonstrated, nor does [it] even argue, that its facilities meet the test" (*id.* at B6) to be an "enigma" (*id.* at A10). Nevertheless, the court determined that "[t]his enigma is not fatal," because "FERC understood [petitioner's] arguments and its evidence," and "substantial evidence supports FERC's denial of pricing credits." *Ibid.*

The court of appeals initially observed that, in seeking rehearing of FERC's January 1996 decision denying the request for credits, petitioner did not present any additional evidence showing integration. Pet. App. A10. Then, the court identified record evidence supporting FERC's determination that petitioner's member utilities interconnect with Florida Power rather than contributing facilities to an integrated transmission system. *Id.* at A10-A12. The court concluded that the evidence before FERC was sufficient to support FERC's determination that petitioner and Florida

Power do not operate an integrated system, despite "some contradictory evidence" on which petitioner had relied. *Id.* at A12.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Review by this Court is not warranted.

1. Petitioner argues (Pet. 7-11) that the Federal Energy Regulatory Commission rendered its decision on rehearing "in total ignorance of [petitioner's] argument" (Pet. 8) about the integration of its facilities with Florida Power's facilities, and that the court of appeals affirmed FERC's decision on grounds not articulated by the agency. Petitioner is mistaken on both counts.

As the court of appeals explained (Pet. App. A9-A10), FERC's July 2001 order identified petitioner's arguments on rehearing. See *id.* at B1-B5. For instance, FERC observed that petitioner had contended that its members' transmission facilities "are comparable to those of Florida Power" and necessary to provide the transmission service at issue. *Id.* at B5.

FERC, however, "disagree[d]" with petitioner's arguments. Pet. App. B5. In particular, FERC noted that petitioner did not dispute FERC's January 1996 finding that petitioner's members interconnect with Florida Power primarily at "single points used only to transfer power between the Florida Power transmission system and that of each [of petitioner's members]." *Id.* at B6. Therefore, when the court of appeals determined in this case that substantial record evidence supports FERC's January 1996 determination about interconnection, see *id.* at A10-A14, the court

simultaneously was upholding FERC's *articulated* reason for denying rehearing in July 2001.

2. Petitioner contends (Pet. 8) that the court of appeals' inability to explain one sentence in FERC's opinion on rehearing—in which FERC stated that petitioner had failed to argue or demonstrate its satisfaction of "the test" for integration (Pet. App. B6)—required the court to remand the entire case. The court of appeals, however, correctly recognized (*id.* at A10) that courts must uphold agency "decision[s] of less than ideal clarity if the agency's path may reasonably be discerned." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Bowman Transp., Inc.* v. *Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)). As discussed above, the court of appeals had no difficulty discerning the agency's path in this case.

3. Petitioner suggests (Pet. 10 n.4) that FERC "would have ruled differently" if it truly did consider petitioner's evidence. In support of that argument, petitioner primarily relies (Pet. 10) on the oral statement of a FERC Commissioner (now FERC's Chairman) that he was "not sure" why petitioner failed to submit evidence of integration with Florida Power that would have been persuasive. Pet. App. F1. Petitioner also cites (Pet. 10-11 n.4) a Notice of Proposed Rulemaking in a different proceeding that has not yet resulted in a final FERC rule, and two decisions that addressed distinct facts. Petitioner makes no attempt to demonstrate a specific inconsistency between FERC's denial of credits to petitioner in this case, and any other decision of the Commission or a court of appeals.

Indeed, FERC's industry-wide rulemaking on nondiscriminatory access to transmission services supports

the agency's decision here. Petitioner's evidence concerning possible integration is inadequate under the rulemaking's articulation of the integration test (see Pet. App. B5-B6) for exactly the same reason given in FERC's order denying petitioner's request for credits: petitioner's evidence showed only that its network is interconnected with Florida Power's network at identifiable points to transfer power, *not* that its facilities and Florida Power's facilities are jointly relied upon "for the coordinated operation of the grid." *Id.* at B6; see *id.* at B25-B28.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2003

SEP 10 2003

No. 03-20

IN THE

Supreme Court of the United States

FLORIDA MUNICIPAL POWER AGENCY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY MEMORANDUM

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ARGUMENT

The Federal Energy Regulatory Commission's ("FERC") brief in opposition is a non-answer to Florida Municipal Power Agency's petition. FMPA demonstrated that the FERC's rehearing order was unequivocally and admittedly wrong on FERC's critical point that:

> FMPA has not demonstrated, *nor does FMPA even argue,* that its facilities meet the [integration] test [for determining whether customer facilities are entitled to credits].

Pet. at 3 (quoting Pet. App. B-6 (emphasis supplied)). In attempting to deal with the FERC's decision, the court of appeals stated:

> So what did FERC mean when it said that FMPA neither argued nor presented sufficient evidence of integration? *We have no idea.*

Pet. App. A-10 (emphasis supplied). The court of appeals ignored FERC's statement and found – contrary to FERC's plain pronouncement – that FERC had considered FMPA's rehearing arguments that FMPA's facilities satisfy the integration test.

FERC attempts to pass the case off as a run of mill administrative review case. FERC seeks to recast the issue as "Whether the court of appeals correctly determined that the Federal Energy Regulatory Commission adequately considered arguments petitioner made in an administrative proceeding." FERC Br. at I. FERC nowhere explains how the court of appeals could ignore FERC's clear, but erroneous, statement that FMPA presented no argument on rehearing concerning the integration test and how the court of

appeals could find to the contrary, based on other fragments of the order, that FERC did consider FMPA's arguments.

Not surprisingly, FERC fails to identify any law that permits a reviewing court to resolve, based upon guesswork, what is at the least a flat contradiction in FERC's order going to the fundamental basis of its decision. FERC argues that reviewing courts must uphold decisions of less than ideal clarity "'if the agency's path may reasonably be discerned.'" FERC Br. at 6 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Rather than responding to Petitioners' petition, FERC in its brief in opposition merely repeats the position of the court of appeals and concludes, "[T]he court of appeals had no difficulty discerning the agency's path in this case." *Id.* FERC's brief nowhere responds to FMPA's argument or attempts to demonstrate by what process, short of divination, the court could discern the FERC's position or disregard FERC's clear statement that it was unaware of any argument offered by FERC addressed to the integration of FMPA's facilities.

Disregarding FERC's clear statement that FMPA offered no argument, an extremely strained effort to make FERC's statements consistent might be that FERC was aware that FMPA argued that it should receive credits because its facilities are comparable to those of Florida Power, but that FERC was unaware that FMPA had argued that it met what FERC considered to be the different test for crediting integrated facilities.[1] Even this stretch would mean that the

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[1] The Commission's description which immediately preceded its statement that no argument had been offered was:

> In its request for rehearing and its response to the Commission's April 2, 2001 order, FMPA reiterates its claims that it is entitled to credits for its facilities, because FMPA's facilities are comparable to those of Florida Power. FMPA argues that to the extent that

Commission was unaware of FMPA's actual rehearing argument (*see, e.g.*, Pet. App. H-12 to H-13, H-18 to H-28) and would therefore have required reversal.

However, FERC's statement that FMPA presented no argument is as plain as the English language permits. When the court of appeals stated that "it had no idea" what FERC meant when it made that statement, what the court of appeals must have meant is that it regarded FERC's statement as so irrational that it would not credit it as written and would

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> the grid is defined to include FMPA's loads, both Florida Power and FMPA transmission are necessary to serve those loads.
>
> We disagree. In Order 888-A, the Commission elaborated on the criteria necessary to meet the system integration test. Specifically, the Commission stated the following:
>
> > [F]or a customer to be eligible for a credit, its facilities must not only be integrated with the transmission provider's system, but must also provide additional benefits to the transmission grid in terms of capability and reliability, and be relied upon for the coordinated operation of the grid. . . . the fact that a transmission customer's facilities may be interconnected with a transmission provider's system does not prove that the two systems comprise an integrated whole such that the transmission provider is able to provide transmission service to itself or other transmission customers over these facilities.

Pet . App. B-5 to B-6 (footnote omitted).

therefore ignore it. The court characterized its inability to solve the "enigma" of what FERC meant (actually, its refusal to credit FERC's straightforward statement) as not fatal, asserting that "under our deferential standard of review, we uphold agency decisions if supported by substantial evidence, 'not withstanding their expository shortcomings.'" Pet. App. A-10 (quoting *Pan-Alberta Gas, Ltd. v. FERC,* 251 F.3d 173, 176 (D.C. Cir. 2001)).

In its petition for certiorari (at 6) FMPA argued:

> The conflict between the proper function of a court reviewing an agency decision and what the court of appeals in fact did is most starkly illustrated by the following hypothetical. Assume at one point in its opinion the agency had stated, "We have reviewed the petitioner's arguments on rehearing concerning issue X and find them lacking for reasons stated in our prior order," and elsewhere it had stated, "We deny rehearing because petitioner has raised no arguments on rehearing concerning issue X." The reviewing court is not allowed to resolve this conflict (necessarily based on its own intuition or guess), but must remand to the agency. Even giving the court of appeals every benefit of the doubt, this was the situation before the D.C. Circuit. In resolving the conflict between the FERC's clear language that FMPA did not argue integration and the (marginal) possibility based on other language in the FERC's opinion that the FERC considered FMPA's arguments, the court finds that the FERC did consider FMPA's arguments. In doing so, it trespassed on the duty of the agency to

> render an intelligible, reasoned decision and substituted its own review for the (unknowable) view of the agency.

Other than mischaracterizing the matter at hand the government has no answer to the foregoing.[2] The court of appeals, the nation's premier administrative court, stepped far beyond the appropriate role of a reviewing court when it substituted its guess as to what the agency meant to state for the explicit statement of the agency. This subverts the basic principle of administrative law that decisions be made by agencies and not by reviewing courts. Further, agency decisions must be sufficiently articulated so that reviewing courts can discern their meaning.[3] FERC's rehearing order

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[2] In another example of FERC's unwillingness to confront Petitioner's argument, FERC asserts in its opposition (at 6) that "Petitioner suggests (Pet. 10 n.4) that FERC 'would have ruled differently' if it truly did consider petitioner's evidence" and "In support of that argument, petitioner primarily relies (Pet. 10) on the oral statement of a FERC Commissioner (now FERC's Chairman) that he was 'not sure' why petitioner failed to submit evidence of integration with Florida Power that would have been persuasive." FERC, however, offers no response to that statement by its Chairman. In fact, what the Chairman stated in discussing the instant case, was that the integration standard is "a pretty easy standard," that it "looks like FMPA has such [integrated] facilities in the Florida region" and that he "is not sure why [a showing of additional benefits from FMPA's transmission] wasn't made in this case" Pet. App. F-1 and F-2. The obvious inference from that statement is that consistent with the statement contained in the Commission's Order, he was unaware that FMPA had presented argument and evidence addressed to the point.

[3] *See, e.g., United States v. Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 511 (1935) ("We must know what a decision means before the duty becomes ours to say whether it is right or wrong.").

may stand only if it is an intelligible reasoned decision.[4] It is not.

When the court of appeals admitted it did not know the meaning of FERC's statement that FMPA had presented no argument on the issue it was obligated to remand. This matter is far from inconsequential because the court of appeals could not know whether or to what extent FERC had actually considered FMPA's arguments and evidence. It is overwhelmingly plain and admitted that FMPA argued and presented evidence that it met FERC's integration standard. If its arguments were not considered, then FMPA never received its basic due process rights to have the decision-maker consider its arguments. And if the court of appeals may nonetheless affirm, while admitting that on this key point it did not know what the agency meant, this is the stuff of cocktail party derision, or worse, the confirmation of some of Shakespeare's and Dickens' more acerbic commentaries on the law.

The court of appeals supplies its own rationale rather than dealing with the Commission's stated position. In failing to remand so that the *Commission* could say what it meant or correct its error, the court of appeals ignores the most fundamental principle of administrative law. The court shifts administrative law to a standard under which agency decisions can be affirmed based on reasons given by reviewing courts and not by the agencies themselves, making reviewing courts the substantive decision-makers.

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[4]Agency rehearing is a mandatory part of the review procedure under the Federal Power Act. 16 U.S.C. § 825l(a) (2000).

CONCLUSION

For the reasons stated above, and in the petition for certiorari, the writ should be granted and the decision of the court of appeals summarily reversed.

Respectfully submitted,

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